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JURISDICTIONAL STATEMENT

Defendant–Respondent Sprint Spectrum, L.P. (“Sprint”) concurs with Plaintiff–Appellant City of St. Louis (“Appellant”) that this Court has jurisdiction over this appeal pursuant to Art. V, § 3 of the Missouri Constitution, which grants this Court exclusive appellate jurisdiction over questions involving the validity of a statute.

STATEMENT OF FACTS

Appellant asks this Court to address the constitutionality of legislation adopted in the 2005 session of the Missouri General Assembly and signed into law by Governor Blunt on July 14, 2005 – H.B. 209.¹ Appellant asserts its Telephone Company Alternative Tax ordinance (“TCAT”) allows it to tax wireless telecommunication services offered by Sprint and other wireless companies (collectively, “the Wireless Companies”) and that HB209 unconstitutionally infringes upon Appellant’s enforcement of TCAT.²

¹ The provisions of H.B. 209 (“HB209”) are codified at Mo. Rev. Stat. § 71.675.1, §§ 92.074 - 92.098, and §§ 227.241 to 227.249.

² This Court has three appeals before it related to the Wireless Companies. Appellant brings the appeal captioned *City of St. Louis, Missouri v. Sprint Spectrum, L.P.* Cause No. SC87400. The University City appellants and St. Louis County bring the appeal captioned *City of University City, Missouri, et al. v. AT&T Wireless Services, Inc., et al.*, Cause No. SC87208. Springfield brings the captioned appeal *City of Springfield, Missouri v. Sprint Spectrum, L.P.*, Cause No. SC87238. This brief is submitted in

TCAT imposes a ten percent (10%) gross receipts tax on every person “engaged in a general telephone business in the City, providing both exchange, or local, and toll or long distance, telephone service to its customers. . .” on receipts “obtained from its customers within the City for any services there provided. . .” Resp. A.01. TCAT further provides that each “telephone company which shall accept [its] provisions . . . shall furnish for use of the City, such wire space as may be required from time to time by the City . . .” *See* St. Louis City Code (“Code”) § 23.34.050. Resp. A.02. A telephone company accepting TCAT does so in lieu of all other taxes “which might be imposed by the City . . . because of its use of the streets, alleys and public places of and in the City, because of its ownership or use of poles, wires, cables, conduits and associated telephone structures . . .” *See id.*

TCAT only applies to companies that “accept [its] provisions”. TCAT requires every “telephone company . . . **desiring** to accept its provisions to file its acceptance with the City Register. Code §24.34.090 (emphasis added). Appellant fails to plead in its Petition that Sprint ever “accepted” TCAT. Code §23.34.060 Resp. A.02.

For its part, Sprint asserts in its affirmative defenses that *inter alia* 1) it is not a “telephone company” providing “exchange of local” service; 2) it does not maintain wires and poles that it has granted Appellant use of; and 3) that it has not “accepted” TCAT by filing an “acceptance” or otherwise. (L.F. 143-151.)

response to Appellant’s appeal. Appellant and the appellants in the other wireless appeals are collectively referred to as “the Municipalities.”

TCAT's plain language may explain why Appellant did not seek to apply it to wireless service until recently, despite the prevalence of and substantial growth in wireless service in the 1990's. But, declining tax revenue from land-line companies and a 1999 decision by the Missouri Court of Appeals for the Eastern District in the *City of Sunset Hills v. Southwestern Bell Mobile Systems* case, apparently spurred Missouri municipalities to claim that wireless services were subject to local utility tax ordinances. (Br. 46-47.) In considering its course of action in trying to apply TCAT to wireless service, Appellant had at least two options. First, it could have amended its ordinance to include wireless service by submitting the issue to its local voters. Second, it could have taken the position that its ordinance, passed decades before wireless service was offered, covers such services. Appellant chose the latter.

The University City Appellants filed the first lawsuit against the Wireless Companies seeking to receive five years of back taxes, interest and penalties and to enjoin the Wireless Companies from providing service in their cities.

Appellant then filed suit on November 20, 2003 seeking to impose TCAT on wireless service. (Br. at 19.) Then St. Louis County, Springfield and Jefferson City filed similar actions seeking similar relief, with Springfield and Jefferson City suing certain companies in federal court, and Springfield pursuing Sprint alone in state court.

Because of this morass of litigation between Missouri municipalities and Wireless Companies, and after a call for legislation, the Missouri legislature took action in 2005. Through months of legislative meetings, hearings, testimony, negotiation and drafting, the legislature crafted the compromise embodied in HB209. HB209 resolves many issues

in dispute and brings certainty as to the prospective applicability of the taxation of wireless services. HB209 harmonizes the competing and diverse interests of the Municipalities – which seek a new and growing source of taxable revenue with respect to wireless services – and the Wireless Companies, which seek to avoid the retroactive imposition of a new and additional tax on wireless service.

HB209 brings wireless service under the umbrella of the ordinances of all Missouri municipalities that currently impose gross receipts taxes on land-line (i.e. local exchange) telephone service. It does so by providing a broad, uniform definition of “telecommunications service” to include wireless service. The Wireless Companies must pay the taxes on a prospective basis at a rate that ensures that: (1) immediately after HB209, the municipalities will receive the same level of revenue that they received under the prior version, interpretation and application of their respective ordinances; and (2) municipalities prospectively will legally tax wireless services. HB209 centralizes the tax collection function with the Department of Revenue, thereby eliminating the labor intensive process of each city collecting its own tax and each company sending separate payments to hundreds of municipalities across the state. The legislative *quid pro quo* for these benefits required the Municipalities to dismiss the pending lawsuits in conjunction with providing immunity to the Wireless Companies for back tax liability.

This case illustrates the complexity, uncertainty and costs of the underlying litigation. Sprint asserts numerous defenses based on both federal and state law, including a counterclaim for declaratory judgment seeking a declaration that Appellant’s application of TCAT to wireless service violates the Hancock Amendment, Article X,

Section 22 of the Missouri Constitution (“Hancock”). (L.F. at 1, 9-14.) Fundamental questions concerning the TCAT’s applicability to wireless service exist.

Despite legislative directive to dismiss the pending lawsuit, Appellant did not do so. Sprint filed a motion seeking dismissal of the lawsuit. (L.F. 4-34.) The Honorable David L. Dowd dismissed Appellant’s lawsuit with prejudice on November 1, 2005. (L.F. 154-155.) Judge Dowd determined that “H.B. 209 is constitutional and requires the dismissal of this case without further showing.” (L.F. 154.) Appellant appealed to this Court.

ARGUMENT

The overarching issue in this appeal is whether industry-specific tax policies in Missouri should be set by the elected representatives in the legislature or by serial litigation. Invalidating HB209 would enable municipalities to circumvent, through litigation, the legislature’s plenary authority over municipal taxation and cripple the legislature’s ability to deal with state-wide problems that exist at the municipal level.

The standard of review applied to dismissed cases has little relevance to Appellant’s appeal. Appellant directs the majority of its arguments to HB209’s constitutionality, and the “rules for challenges to the constitutional validity of statutes are well established.” *City of St. Charles v. State*, 165 S.W.3d 149, 150 (Mo. banc 2005). As this Court recently stated:

Statutes are presumed to be constitutional. Accordingly, the burden to prove a statute unconstitutional rests upon the party bringing the challenge. This Court will not invalidate a statute unless it clearly and

undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution. This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute.

Reproductive Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, No. SC 86768, 2006 WL 463575, at *2 (Mo. banc Feb. 28, 2006) (citations omitted).

Appellant, in challenging the constitutionality of HB209, must “negative every conceivable basis which might support it” and cannot overcome the presumption of constitutionality “by generalities of law or fact.” *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 (Mo. banc 1992). Moreover, Appellant cannot sustain a constitutional challenge with conclusory assertions of unconstitutionality. *See Callier v. Dir. Of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989) (“A party asserting the unconstitutionality of a statute....bears the burden of supporting that contention by at least relating his arguments to the statute by ordinance and issue at hand”); *Massage Therapy Training Inst. v. Bd. of Therapeutic Massage*, 65 S.W.3d 601, 605, 609 (Mo. App. 2002) (party must develop claim of unconstitutionality “by citations to relevant authority or argument beyond mere conclusions.”). The Court must find a statute constitutional unless there is no possible interpretation of the statute conforming to the constitution’s requirements. *Beatty v. State Tax Comm’n*, 912 S.W.2d 492, 495 (Mo. banc 1995).

Appellant does not and cannot meet its burden of showing that HB209 clearly and undoubtedly violates the constitution. Appellant attempts to obfuscate its burden by misinterpreting dicta in a footnote in *Witte*, in which this Court, stated: “...the rule

concerning the presumption of constitutionality and the burden of proof [do not] apply ‘where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision.’” 829 S.W.2d at 439, n.2. (citing *McKay Buick, Inc. v. Love*, 569 S.W.2d 740, 743 (Mo. banc 1978)). The *Witte* Court, however, did not apply this exception. *Witte*, 829 S.W.2d at 439, n.2.

This Court has only invoked that exception on two occasions – both decisions holding that the statutes at issue, on their face, directly contravened the express requirement in Art. X §4(b) of tax assessment based on property value. See *McKay Buick, Inc. v. Spradling*, 529 S.W.2d 394 (Mo. banc 1957); *McKay Buick, Inc. v. Love*, 569 S.W.2d 740, 743 (Mo. banc 1978). Appellant fails to establish that the *McKay* exception applies here. Indeed, Appellant cannot credibly argue that HB209 “readily and clearly” violates the constitution but need 123 pages of arguments, relying on extraneous evidence.

Appellant also asserts that it is improper for a court to decide the merits of a declaratory judgment action by dismissal. (Br. at 34.) However, the trial court did not rule on the merits of Appellant’s claim; rather, the trial court properly dismissed the underlying litigation on the basis that HB209 “is constitutional and requires the dismissal of this case without further showing.” (L.F. 154.) HB209 directed Appellant to dismiss its lawsuit *immediately* - without a showing of the merits. See RSMo. § 92.089.2 (emphasis added). The declaratory judgment standard does not apply. The trial court properly entered judgment in Sprint’s favor.

I. Numerous defenses exist to the enforcement of TCAT.³

In all of the cases currently before the Court, the Wireless Companies have submitted numerous, good-faith defenses to the Municipalities' claims, including the following:

A. Strictly construed in favor of Sprint, TCAT does not apply to Sprint's services.

TCAT, which by its terms requires acceptance by a taxpayer, applies only to gross receipts derived from "both exchange, or local, and toll of long distance telephone service" provided to customers "within the city." Resp. A.01. The tax is imposed on gross receipts obtained from "customers within the City for any services there provided, except such receipts as represent charges for message rate toll, or long distance, telephone service, . . . interzone telephone service, . . . exclusive interstate service . . . or for other services furnished exclusively and permanently in connection with services extending beyond the boundaries of the City," Resp. A.01. At least three critical issues exist regarding TCAT: (1) does wireless service fall within the categories of service identified as taxable in TCAT, (2) if so, do the particular charges billed to any wireless customer relate to services provided "within the city," and (3) did Sprint ever "accept" TCAT in writing?

³ This section responds to arguments Appellant makes throughout its brief regarding Sprint's defenses to TCAT. Sprint presents a comprehensive response here to avoid duplication.

This Court has determined that “within the city,” as used in an ordinance regulating rates for telephone service, contemplates only local exchange telephone service - not telephone communication between a resident in the city and a person outside the city. *See Home Tel. Co. v. City of Carthage*, 139 S.W. 547, 549 (Mo. 1911). There are a number of possible methods for determining whether service provided with respect to a particular wireless call should be treated as “within the city,” including: (1) both ends of the call must be “within the city”; (2) one end of the call must be “within the city” and the charges for the call must be billed to an address in the city, (3) the cell tower that originally picks up the call must be located in the city, or (4) the wireless switch serving the call must be “within the city.”

TCAT gives no indication as to whether any of these methods (or any other) should be used. The issue is further complicated by the fact that, in almost all cases, Sprint does not bill for wireless service on a “call by call” basis. Rather, it operates a nationwide network and charges each customer a monthly lump sum fee for access to the nationwide network. Sprint accordingly has a strong argument that the monthly nationwide access fees should never be treated as charges for service provided “within” a particular city.

Construing TCAT narrowly against Sprint, as required by Missouri law, disputed issues like these must be resolved in Sprint’s favor.⁴ Substantial issues exist as to

⁴ This Court has consistently held that statutes relating to taxation are to be narrowly construed in favor of the taxpayer and against the taxing authority. *See, e.g., Cascio v.*

whether wireless service is subject to taxation given the limitations of TCAT's language. TCAT's limitations create numerous issues regarding its applicability to wireless services. "Within the city" does not describe the services Sprint provides to its customers that pay monthly fees for access to nationwide (or at least statewide) networks. Appellant's delay in attempting to impose TCAT on wireless service evidences Appellant's recognition that standard land-line telephone taxes do not apply to wireless services.

Sprint's ordinance construction defense is consistent with the weight of the authority in other states. Numerous courts have concluded that a statutory reference to "telephone" service does not include wireless service. *See, e.g., In re Topeka SMSA Ltd. P'ship*, 917 P.2d 827, 836 (Kan. 1996) (holding that provider of cellular service was not "transmitting to, from, through or in this state telephonic messages" and therefore was not a public utility); *Ram Broad. of Mich., Inc. v. Mich. Pub. Serv. Corp.*, 317 N.W.2d 295 (Mich. Ct. App. 1982) (concluding that the term "telephone company" did not

Beam, 594 S.W.2d 942, 945 (Mo. 1980). This rule of statutory construction applies to ordinances. *See David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 191 (Mo. banc 1991) ("[T]he licensing tax set forth in the ... ordinance is to be strictly construed against the city. There is to be no ambiguity that [the taxpayer] was intended to be taxed under the ordinance and that the taxing power exists." (emphasis added)), *overruled on other grounds by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997).

include providers of two-way mobile communication service); *Wilson Communications, Inc. v. Calvert*, 450 S.W.2d 842, 844 (Tex. 1970) (holding that provider of mobile radio service was not subject to gross receipts tax on entities operating “any telephone line or lines, or any telephone within this State and charging for the use of same”); *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577, 581-82 (Fla. 1965) (holding that provider of mobile radio service was not “telephone company” and therefore not subject to jurisdiction of state utilities commission because the state legislature clearly did not contemplate such a use at the time of enactment). In each of these cases, the court found that the mobile radio service in question was not “telephone” service even though such radio service – like Sprint’s service – was connected with the public switched telephone network. *See also S. Message Serv. v. Louisiana Pub. Serv. Comm’n*, 554 So.2d 47, 52 (La. 1989) (describing disagreement between courts in various states about whether radio common carriers are “telephone companies”); *Mobile Radio Commc’ns, Inc. v. Dir. of Revenue*, 1982 WL 12037 (Mo. Admin. Hrg. Com. 1982; Case No. RS-79-0199) (holding that reference to “telephone” service in Missouri sales tax statutes did not include mobile radio service; Missouri legislature subsequently amended sales tax statute to provide that both “telephone” and “telecommunications” service would be subject to the sales tax in order to remedy the problem created by the distinction).

Given the ample authority supporting Sprint’s position, it is understandable that Appellant clings to the June 9, 2005 Order issued in *City of Jefferson City, et al. v. Cingular Wireless LLC et al.*, Case No. 04-4099-CV-C-NKL (W.D. Mo. 2005) (the

“Federal Order”)⁵. (See, e.g. Br. at 38). The Federal Order applies to neither Appellant nor Sprint. It is merely an interlocutory order, still subject to an evidentiary hearing and appeal.⁶

The Federal Order does not resolve the issue of whether the far-reaching wireless service Sprint provides could ever be treated “within the city.” In fact, the federal court stated specifically that “quantifying with precision the location where a call is made or received may be a problem in the damage phase of this dispute” and that “the dispute over the amount of taxes owed is not before the Court.” (L.F. at 226-31.) Thus, even if a Missouri state court were to agree with the Federal Order’s conclusion regarding the scope of the term “telephone” (a conclusion Sprint disputes), Appellant would still face the heavy burden of demonstrating that charges billed to a particular customer are for

⁵ Sprint Corporation, not Sprint, is a counterclaimant in that action seeking only a declaratory judgment. Although summary judgment was entered on that counterclaim (Resp. A.16-17), the order is not yet appealable, and Sprint Corporation’s motion to vacate that judgment on the basis of HB209 is stayed pending outcome of these cases.

⁶ Not surprisingly, Appellant does not trumpet the decision of Judge Dowd or the other circuit judges below in dismissing this and similar cases like it does the lone decision of the federal court.

services provided “within the city,” when the only known connection between such customers and the city is that the customer’s billing address is located within the city.”⁷

Appellant also relies on *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. App. 1999). This case, however, has minimal impact on Sprint’s defenses. In *Sunset Hills*, the applicable city ordinance purported to tax any business that maintained a telecommunications tower in the city. 14 S.W.3d at 57. The threshold issue was whether the city ordinance was properly enabled under state law. *Id.* at 58-59. RSMo. § 94.270 authorizes fourth class cities (such as Sunset Hills) to impose a license tax on “telephone companies,” and an issue existed regarding whether maintaining a wireless communications tower/antenna in Sunset Hills could cause the taxpayer to be treated as a “telephone” company under Section 94.270. The court ruled in favor of the city on that issue. *State v. Faulkner*, 145 S.W.3d 48, 58-59 (Tenn. 2005). Once the threshold issue was decided, there was no question that the taxpayer owned a

⁷ During all of the litigation between the Municipalities and the Wireless Companies, the Municipalities, including Appellant, have not cited one case holding that mobile telecommunications service should be treated as provided “within a city” merely because a customer’s billing address is located in the city. There is only one known case addressing this issue, and, in that case, the court held that mobile service cannot be treated as provided “within” a particular taxing jurisdiction simply because a customer’s billing address is located in the jurisdiction. *See Answer Iowa, Inc. v. Dep’t of Revenue*, 514 N.E.2d 488, 493-94 (Ill. App. 1987).

telecommunications tower located within Sunset Hills (i.e., the city's "telecommunications antenna" ordinance clearly applied). Thus, the court in *Sunset Hills* was not asked to, and did not, address the difficult statutory construction issues that courts will face when determining whether TCAT's language applies to wireless service. Finally, *Sunset Hills* does not involve or mention the clearly disputed issue as to whether the "within the city" language in TCAT can be construed to cover any portion of the charges Sprint receives in exchange for providing wireless service to its customers.

B. Even a brief explanation of Sprint's Hancock defenses illustrates that Sprint raises substantial issues to Appellant's claims.

Hancock, approved by Missouri voters on November 4, 1980, prohibits a Missouri city from (i) "levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution [as of November 4, 1980]," or (ii) "increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter [as of November 4, 1980]," unless such action is approved by city voters. MO. CONST. art. X, §22(a). Also, if a city broadens the taxable base of an existing tax, there is a Hancock violation unless the city reduces the rate of the levy such that, when applied to the new base, the reduced levy yields an amount of gross revenue equal to the gross revenue received on the prior taxable base. *Id.* The broadening of the base of an existing tax "involve[s] the inclusion of new types of property, not previously taxed, within the tax base and against which a tax could be levied." *Tannenbaum v. City of Richmond Heights*, 704 S.W.2d 227, 229 (Mo. banc 1986).

Prior to the onset of this litigation, Appellant never attempted to apply TCAT to Sprint - hence the request for five years of back taxes. Then, in filing this litigation, and in a complete reversal of form, Appellant took the position that Sprint was subject to TCAT. This increase in tax, or new tax, occurred long after the adoption of the Hancock Amendment and without voter approval. Appellant's imposition of this additional tax is either the levy of a new tax or a broadening of the taxable base of an existing tax without a corresponding reduction in the rate of the levy.⁸

A factual and legal basis exists for all of Sprint's defenses. For that reason, this Court's review of Appellant's challenges is most properly viewed in the context of the underlying litigation in which Sprint asserted substantial defenses.

II. HB209 does not violate Article III, § 38(a): It does not involve a grant of public money or public credit and it has a valid public purpose.⁹

Article III, § 38(a) of the Missouri Constitution prohibits the General Assembly from granting public money or property or lending public credit to private persons, associations, or corporations, "excepting aid in public calamity." MO. CONST. art. III,

⁸ TCAT is also impermissibly vague. Its language was adopted decades ago prior to the advent of wireless service, and it is not clear how TCAT would apply to wireless service. *See Board of Education v. State*, 47 S.W.3d 366, 369 (Mo. banc 2001) ("where the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void").

⁹ This section responds to Point 2 of Appellant's brief.

§ 38(a). A grant of public money to a private entity is not, standing alone, unconstitutional; if a grant of public money or credit serves a public purpose, it does not violate Article III, § 38(a). *Fust v. Attorney Gen.*, 947 S.W.2d 424, 427-28 (Mo. banc 1997). As explained below, HB209 does not violate Article III, § 38(a) because it does not grant public money or lend public credit to private companies, and even if it did, HB209 has valid public purposes – to promote the economic well-being of the state and to promote uniformity and certainty in the taxation of telecommunication companies.

A. HB209 does not grant public money or lend public credit because no public funds are involved and no taxes are due and owing to Appellant.

HB209 does not authorize or require payment of public funds or lending of public credit to any private party. This Court has confirmed that money, such as tax revenue, does not become a “public fund” until the taxes are collected and the money is paid into the treasury. *State ex rel. City of Kirkwood v. County Court of St. Louis County*, 44 S.W. 734, 737 (Mo. 1898). The “constitutional prohibition against the lending of credit is to prohibit the state from acting as a surety or guarantor of the debt of another.” *State ex rel. Jardon v. Indus. Dev. Auth. of Jasper County*, 570 S.W.2d 666, 676 (Mo. banc 1978).

Recognizing that no public fund or credit is involved, Appellant insists Sprint owes it taxes, ignoring that its claims have not been determined to be valid or liquidated. Based on this flawed premise, Appellant argues HB209 results in “a naked gift of public financial resources.” (Br. at 43-44.) But without public monies collected and paid or public credit extended, and without a valid or liquidated claim, Appellant cannot establish any violation of Section 38(a).

Appellant relies on *Curchin v. Missouri Industrial Development Board*, 722 S.W.2d 930 (Mo. banc 1987), a revenue bond tax credit case. In *Curchin*, a taxpayer challenged the constitutionality of RSMo. § 100.297, which allowed the Missouri Industrial Development Board (“Board”) to issue revenue bonds to select private businesses chosen by the Board. These bonds contained provisions for the allowance of a state tax credit to the bondholders for any unpaid principal and accrued interest in the event of default by the underlying obligor. *Id.* at 931. The Court ultimately determined the statute was unconstitutional under Article III, § 38(a) because “granting a tax credit and foregoing the collection of the tax” was no different than the state “making an outright payment to the bondholders” in the event of a default. *Id.* at 933.

The context of this dispute is different. The legislation in *Curchin* could quite properly be equated with the state writing a check to the taxpaying bondholders – the taxpayers received a direct dollar-for-dollar credit against their *undisputed* state tax debt. Here, Appellant’s claims and TCAT’s applicability are contested and unresolved. Sprint asserts substantial defenses evidencing the unliquidated and disputed nature of the claims. If Sprint prevails on the underlying claims, no actual liability will exist. In *Curchin*, there could be no question that state funds were going to be directly paid to the taxpayers, and therefore, the statute violated Article III, §38(a). Here, there is no certainty that an actual tax liability exists or that it will be discharged under HB209.

Appellant only speculates that it will lose tax revenue under HB209. But a statute does not violate Article III, § 38(a) merely because it might involve the payment of public funds. *Cf. Sommer v. City of St. Louis*, 631 S.W.2d 676, 679-80 (Mo. App. 1982)

(to confer taxpayer standing under Article III, § 38(a), a tax abatement can only be deemed an expenditure of public funds if “a loss of revenue to the city ‘arises as a *necessary conclusion*’”; if a court “can conclude from the record that a net loss of revenue to the city is a *possible result*” of the alleged expenditure but cannot determine such a loss is a “*necessary result*,” there is no public fund expenditure). (emphasis added)

Appellant cites *Champ v. Poelker*, 755 S.W.2d 383, 385 (Mo. App. 1988), in which taxpayers challenged a transfer of money from the Industrial Development Authority of the City of St. Louis to a campaign committee for payment of the committee’s debts. The court of appeals never reached the constitutionality of the payments under Article III, § 38(a); rather, it held the taxpayers lacked standing to make such a constitutional challenge. Also, Appellant cites *Sommer*, in which the court of appeals held that a city alderman, a taxpayer, and an unincorporated citizens coalition lacked standing to challenge the constitutionality of a city ordinance providing a partial tax abatement to a redevelopment corporation under RSMo. § 353.110. 631 S.W.2d 676 (Mo. App. 1982). As in *Champ*, the court of appeals never reached the constitutionality of the tax abatement under Article III, § 38(a). The dicta in *Champ* and *Sommer* is irrelevant to this case and in no way alters the rule established in *Kirkwood* that funds do not become “public” until collected and paid into a city’s treasury.

Appellant also cites to *State ex rel. Board of Control of St. Louis School and Museum of Fine Arts*, in which this Court held that a tax statute directing tax revenue to be given to Washington University to support the art museum, a department of the

university, was an unconstitutional grant of public money to a private corporation. *State ex rel. Board of Control of St. Louis School and Museum of Fine Arts*, 115 S.W. 534, 548 (Mo. 1908). HB209 provides for no such transfer or support. Next, Appellant cites to a case where this Court held that a police relief association fund created by statute was not supported, wholly or in part, by public money where the funds at issue consisted of money accumulated by the police commissioners board from: (a) funds belonging to unincorporated police relief groups; (b) the sale of unclaimed property; (c) fines assessed by any police commissioner board against officers; (d) fees paid by members of a police relief group; and (3) a percentage of any rewards allowed to any officer. *State ex rel. St. Louis Police Relief Ass'n v. Igoe*, 107 S.W.2d 929, 934 (1937). This case lends no support to Appellant's Section 38(a) challenge.

Appellant's repeated citation to the Federal Order ignores that it is merely an interlocutory order, still subject to an evidentiary hearing and appeal. The Federal Order does not establish a certain "tax liability" on the part of any taxpayer. Rather, it states: "the dispute over the amount of taxes owed is not before the Court." Resp. A.20. Nothing in the Federal Order addresses how a particular tax liability would be computed or if back taxes are actually owed. Thus, Appellant's back tax claim against Sprint remains vastly different from the fixed and certain tax credit in *Curchin*.

Appellant fails to meet its heavy burden of demonstrating that HB209 clearly and undoubtedly involves a grant of public money or public credit.

B. HB209 serves a public purpose by ending litigation that is detrimental to the state's economic well-being and establishing uniformity and certainty in the taxation of telecommunications companies.

Even if HB209 did involve a grant of public funds or public credit, HB209 promotes the economic welfare of the state and thus serves a valid public purpose in compliance with Section 38(a). *See Fust*, 947 S.W.2d at 429-30 (holding statute creating a tort victims' compensation fund benefiting certain individuals at others' expense constitutional because it served valid public purpose of reducing number of uncompensated tort victims requiring public assistance and limiting windfall recoveries to other tort victims).

Through the legislative fact-finding process – taking testimony, studying the issues, and considering reports and other data submitted by interested parties – the Legislature determined the protracted litigation between the Municipalities and the Wireless Companies was “detrimental to the economic well being of the state” RSMo. § 92.089.1. HB209 addresses costs that are not limited to, as Appellant suggests, actual costs of the litigation. Appellant asserts that “costly litigation” refers only to the legal budget of the Wireless Companies because Appellant is represented by “in-house” attorneys. (*See Br.* at 46.) Appellant ignores other costs of the litigation – the time spent by municipal and industry personnel on the litigation (e.g., managing the litigation, responding to discovery, and providing testimony), the delay and uncertainty in collecting revenue to provide municipal services during years of continuing litigation, and the statewide expenditure of scarce judicial resources. By ending the litigation, the

Legislature freed up these resources and prospectively allowed the Municipalities to focus on providing services with the certainty of tax payments by the Wireless Companies. *Cf. Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854, 860 (Mo. banc 1997) (“The legislature may have determined it was in the public’s interest to end the expenditure of time, money and energy on intra-governmental litigation and to refocus the school districts on educating youth . . .”).

Missouri courts defer to the Legislature’s determination of what constitutes a “public purpose.” *Fust*, 947 S.W.2d at 430. The Legislature’s expression of the public policy of the state is “entitled to weighty consideration.” *Jasper County Farm Bureau v. Jasper County*, 286 S.W. 381, 384 (Mo. 1926). *See also Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 682 (Mo. banc 2000) (“ . . . when the legislature has spoken on the subject, the courts must defer to its determination of public policy”). As explained by this Court long ago,

what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under the pretense of lawful authority, it has assumed to exercise one that is lawful.

State ex rel. City of St. Louis v. Seibert, 24 S.W. 750, 751 (Mo. 1893).

To determine whether there is a sufficient public purpose behind a grant of public money, courts employ the test described in *State ex rel. Jefferson v. Smith*, 154 S.W.2d 101, 102 (Mo. banc 1941). Under this test, “[i]f the primary *object* of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful.” *Id.* (emphasis added). On the other hand, “if the primary object is not to subserve a public municipal purpose, but to promote some private end,” the expense is unconstitutional, even if the public receives an incidental benefit. *Id.* “Not only has Missouri acknowledged that the ‘public purpose’ must change with the times, the courts have recognized as well that they must defer to the legislature when it declares that a specific purpose is public.” *J.C. Nichols Co. v. City of Kansas City*, 639 S.W.2d 886, 891 (Mo. App. 1982). The term “public purpose” is elastic and encompasses varying goals and objects of legislation. *Fust*, 947 S.W.2d at 430. Appellant makes reference to a “primary effect,” ignoring the test’s language. *State ex rel. Jefferson* makes it clear that it is the primary *purpose*, or *object*, that is to be considered. *State ex rel. Jefferson*, 154 S.W.2d at 102. Focusing on the *purpose* makes sense in that the purpose can be determined from the face of the legislation whereas the effects cannot be determined, if at all, until after the legislation is implemented.

Valid public purposes include promoting economic welfare and the expansion of telecommunications services. In *McKittrick v. Southwestern Bell Telephone Co.*, 92 S.W.2d 612, 613-614 (Mo. banc 1936), this Court held the Legislature’s grant to telephone companies of the right to place their telephone lines under, along, and across

public roads, streets, and waters without compensation to the public served a valid public purpose in promoting the expansion of telephone service. In *Jardon*, 570 S.W.2d at 675, this Court held a statute authorizing issuance of tax-exempt revenue bonds to finance the construction of a private corporation's facilities was constitutional because it served the public purpose of stimulating economic welfare. Similarly, in *State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592, 596 (Mo. banc 1980), the Court held a statute authorizing the issuance of tax-exempt revenue bonds to a private corporation for the development of land near a river was constitutional because it served the public purposes of promoting the general welfare, encouraging private capital investment by fostering the creation of industrial facilities, increasing the volume of commerce, and promoting the establishment of a foreign trade zone.

The Legislature has declared it to be the State's public policy to improve its economic well-being by ending costly litigation and by establishing uniformity and certainty in the taxation of telecommunications companies. RSMo. § 92.089.1. These are sufficient and valid public purposes. This Court must defer to the Legislature's determinations.¹⁰ *Fust*, 947 S.W.2d at 430; *Jasper County Farm Bureau*, 286 S.W. at 384.

¹⁰ Further, the principle of *expressio unis est exclusio alterius* applies to the issue of deference to the legislature. See, e.g. MO. CONST. art. III, § 40(30) (providing that "where a general law can be made applicable, and whether a general law could have been made

To overcome this deference, Appellant must demonstrate that the Legislature's determination that HB209's purpose is to promote the economic well-being of the state is "arbitrary and unreasonable." *State ex rel. Wagner*, 604 S.W.2d at 597. Appellant asserts two arguments: (1) that HB209 is "counterfactual" as to "costly litigation" and the representation that Appellant's claims have not been determined "valid;" and (2) that HB209 arbitrarily favors telecommunications companies that did not pay taxes and were sued by the Municipalities. (Br. at 45-46.)

Appellant's first argument lacks merit. First, it highlights Appellant's myopic view of the "costs" of the litigation, discussed above, and ignores other costs. (Br. at 46.) HB209's statement that "the claims of the municipal governments have neither been determined to be validated nor liquidated" is not, as Appellant insists, "belied" by *Sunset Hills* or the Federal Order. (Br. at 46.) As discussed in Ssection I, *supra*, neither *Sunset Hills* no the Fedearl Order validates or liquidates Appellant's claims against Sprint under TCAT.

Appellant suggests HB209 will cause "cash-strapped municipalities" to be unable to meet their budgets, requiring them to "engage in borrowing due to tax revenue shortfalls." (Br. at 43.) This argument is disingenuous. The public services (street improvements, police and fire protection, etc.) for the period of the back taxes at issue have long since been provided. There cannot be a "revenue shortfall" threatening police

applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.")

or fire protection services provided years ago. Appellant provides no record support for its claims. In fact, HB209 actually assists the Municipalities on a prospective basis by allowing them to budget date-certain revenue payments from Wireless Companies. Of course, each Municipality always had the ability to ask its voters to approve a new ordinance that actually applies to wireless service, thereby allowing it to collect wireless-based revenue even sooner. Other cities that have done so surely reaped the benefits since without the need for litigation.

Appellant's second argument is likewise flimsy. Any wireless company's decision to pay a questionable tax rather than litigate its validity is a business decision neither binding on its competitors nor a legal determination. It does not demonstrate "clearly and undoubtedly" that the Legislature's determination is arbitrary or unreasonable. The Court should reject Appellant's speculative theory. *See Jardon*, 570 S.W.2d at 675 (rejecting argument that statute caused competitive hardship where appellant offered no evidence of the "hypothetical increase in competition," and any such increase would be outweighed by the public interest). Further, any complaint of unfair competitive advantage belongs to that wireless company, which, as a party to the University City Appeal, supports HB209. *See* Resp. A.3; (L.F. 777).

Appellant fails to sustain its burden of demonstrating that the Legislature's determination that HB209 serves a public purpose is "arbitrary and unreasonable." *See State ex rel. Wagner*, 604 S.W.2d at 597. Appellant's attempt to have this Court substitute its judgment for that of the Legislature fails: absent a showing that HB209 "clearly and undoubtedly contravenes" Section 38(a) and "plainly and palpably affronts"

the fundamental law represented therein, this Court should not substitute its judgment for that of the legislature.¹¹ *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001).

III. HB209 does not violate Article III, § 39(5): It compromises Appellant’s speculative claims in favor of fundamental state interests.¹²

Article III, § 39(5) of the Missouri Constitution prohibits the Legislature from “releasing or extinguishing . . ., without consideration, the indebtedness, liability or obligation of any corporation or individual due . . . any county or municipal corporation.” Appellant claims HB209 violates § 39(5) by (1) immunizing telecommunications companies from the payment of certain municipal “telephone” license taxes for periods up to and including July 1, 2006 and (2) requiring Appellant (and certain other Missouri cities) to dismiss pending lawsuits to collect such taxes.

A. HB209 does not extinguish a debt to Appellant because its claims are not fixed as a sum certain.

HB209 does not extinguish an “indebtedness, liability or obligation”; it requires the dismissal of lawsuits seeking to collect disputed claims. *Beatty v. State Tax Comm’n*,

¹¹ *Cf. Mid-State Distrib. Co. v. City of Columbia*, 617 S.W.2d 419, 424 (Mo. App. 1981) (“We might have the opinion that the ordinance was not really an effective or efficient engine to achieve the desired end. But we cannot substitute our judicial judgment for the legislative judgment of the lawmaker . . .”).

¹² This section responds to Point 3 of Appellant’s brief.

912 S.W.2d 492 (Mo. banc 1995), this Court’s most recent pronouncement on § 39(5), clarifies that no actual liability is being extinguished in this case.

In *Beatty*, the Legislature passed a new property tax law (H.B. 211) that expanded the definition of the term “residential property” to include apartment buildings. *Id.* at 494. “Residential property” is subject to a favorable assessment rate. *Id.* Thus, H.B. 211’s effect was to reduce the property tax liability of taxpayers owning apartment buildings. *Id.* H.B. 211 took effect on August 28, 1995 but purported to apply to all property owned on January 1, 1995. *Id.* The *Beatty* plaintiff argued H.B. 211’s retroactive effect violated § 39(5), noting that on January 1, 1995 (the day for determining which property would be subject to tax for 1995), certain taxpayers owned apartment buildings that were subject to the higher “commercial property” assessment rate. But because of H.B. 211, these taxpayers paid 1995 taxes at the lower “residential property” rate. According to the plaintiff, this amounted to a release or extinguishment of the taxpayers’ 1995 property tax liabilities in violation of § 39(5).

This Court disagreed, stating: “Until the tax liability is fixed as a sum certain, the definitions used to arrive at that liability are subject to change by the legislature.” *Beatty*, 912 S.W.2d at 497. Thus, the retroactive application of H.B. 211 did not violate § 39(5).

In short, this Court held that a tax liability does not amount to an “indebtedness, liability or obligation” within the meaning of § 39(5) “until the tax liability is fixed as a sum certain,” and that a mere “inchoate obligation to pay some tax” is not protected by § 39(5). As a result, such claims are subject to legislative compromise.

Appellant cites *Graham Paper Co. v. Gehner*, 59 S.W.2d 49 (Mo. banc 1933), to support the position that its claims against Sprint fall within § 39(5). (Br. at 49-50.) In *Graham*, the Court held that “an inchoate tax . . . is such a liability or obligation as to be within the protection of [Article III, Section 39(5)].” *Id.* at 52. But based on *Beatty*, *Graham* is no longer good authority on *that* point. Moreover, *Graham* involved a sum certain. *See Graham*, 59 S.W.2d at 50 (“[I]t was agreed that...the tax increase would be \$1,635.20. This is the amount in dispute.”) Thus, *Graham*’s reference to the tax there as “inchoate” or “unmatured” simply meant that the liquidated, undisputed amount was “not due or yet payable.”¹³ (*Id.* at 52). Appellant cites to *First Nat’l Bank v. Buchanan County*, 205 S.W.2d 726, 728 (Mo. 1947), which also involved a sum certain: “[t]he ordinance levies a tax on all the banks totaling \$28,902.25.” What’s more, Section 39(5) does not prohibit extinguishing uncertain claims alleged to be owed after the taxable event. Rather, it bars extinguishing liquidated and certain claims, *Beatty*, 912 S.W.2d at 497-98, regardless of the taxable event. *See Graham*, 59 S.W.2d at 52 (provision extends to taxes “though not due or yet payable”).

Appellant argues it has a claim to inchoate and past due taxes because the taxable

¹³ Second, even if Appellant seeks to tax all wireless receipts at a given rate, its claims are still unliquidated because the tax base is disputed. *See supra* Section I. *See also State ex rel. Ford Motor Co. v. Gehner*, 27 S.W.2d 1, 3 (Mo. banc 1930).

event for a gross receipts tax is “the billing of the revenue.”¹⁴ (Br. at 51-52.) This argument presupposes that TCAT, as written, applies to wireless service - an issue that has not been determined by any final judgment.¹⁵ This argument does not bring Appellant outside *Beatty*’s reach for the simple reason that no liability under TCAT is “fixed as a sum certain.” *Beatty* at 498.

Appellant also quotes heavily from an 1874 Iowa Supreme Court decision, *City of Dubuque v. Illinois Central R. Co.*, 39 Iowa 56, 1874 WL 416 (Iowa 1874), claiming the legislation at issue in that case, which was held unconstitutional, is similar to HB209. (Br. at 52). In *Dubuque*, however, there was a final judgment as to tax liability plus an assessed amount of taxes – neither of which is present in this case. 39 Iowa 56, 1874 WL 416, at * 1-2.

Appellant’s claims fall far short of the *Beatty* standard. It has not audited Sprint, issued an assessment, or specified an amount in its Petition. (L.F. 119-135.) Because the amount it seeks is unliquidated, its claims are not constitutionally protected. *Cf. State ex*

¹⁴ Like Appellant, counsel for Sprint could not locate any Missouri case law supporting Appellant’s remarkable position.

¹⁵ Appellant proposes that *Graham* supports its argument because the *Graham* Court held that income tax liabilities already incurred cannot be waived or compromised by the legislature. (Br. at 52.) An income tax is not the same as a business license tax. *Cf. King v. Procter & Gamble*, 671 S.W.2d 784, 785 (Mo. banc 1984); *Brennan v. Dir. of Revenue*, 937 S.W.2d 210, 212 (Mo. banc 1997).

rel. Carmichael v. Jones, 41 So.2d 280, 285 (Ala. 1949) (even where suit sought exact amount, this amount was unprotected from extinguishment because a “fixed” assessment “was the purpose of the suit”); *State ex rel. S. Real Estate & Fin. Co. v. City of St. Louis*, 115 S.W.2d 513, 514 (Mo. App. 1938) (“[u]ntil the amount of the tax was finally fixed and determined so that not only could realtor be required to pay it but the city to accept it, there was no tax due the city from realtor”).

Appellant also argues that the Federal Order supports its § 39(5) argument. (Br. at 57.) Of course, the Federal Order does not establish a “fixed” and “sum certain” liability. Resp. A.05-17. Rather, it is a preliminary finding that the companies involved in that case may owe “some” tax liability in two cities. *See supra* Section I. Under *Beatty*, such “an inchoate obligation to pay some tax” does not amount to an “indebtedness, liability or obligation” under Article III, § 39(5). *Beatty*, 912 S.W.2d at 498.

B. Even if HB209 did extinguished a debt to Appellant, the State provided adequate consideration by guaranteeing a definite, steady, and broader revenue stream in the future.

Even if Appellant’s underlying claims against Sprint constitute an “indebtedness, liability or obligation,” HB209 does not violate § 39(5). Section 39(5) prohibits the General Assembly from “releasing or extinguishing . . . without consideration [an] indebtedness, liability or obligation.” Here, the release of the back tax claims was not “without consideration.”

HB209’s legislative findings fit comfortably within the parameters of § 39(5). In HB209, the Legislature found specifically that the Municipalities did, in fact, receive “full and adequate consideration” for the resolution of their claims, declaring as follows:

The general assembly further finds and declares that the resolution of such uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities resulting from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of [RSMo.] Sections 92.074 to 92.098 are full and adequate consideration to municipalities, as the term “consideration” is used in Article III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits outlined in [RSMo. § 98.089.2].

RSMo. § 92.089.1.

Appellant suggests that by so declaring, the Legislature has somehow “invaded the province of the judiciary” and engaged in “legislative overreaching.”¹⁶ (Br. at 54-55.) To the contrary, this Court gives great deference to Legislative declarations.¹⁷ For example, in *Laret Investment Co. v. Dickmann*, 134 S.W.2d 65 (Mo. banc 1939), the legislature passed a law creating a particular housing authority and declared the housing authority was a “municipal corporation” incorporated for essential public purposes,

¹⁶ For additional discussion on this point, see *infra* at Section VI.

¹⁷ See n.10, n.11 and accompanying discussion, *supra*.

ensuring the housing authority's property would be exempt from property tax. The Court accepted the declaration:

The finding and declaration of the General Assembly are not binding on this court, but are entitled to great weight. We do not know, and are not at liberty to ascertain, what evidence they had before them; we can only indulge the presumption that the evidence was sufficient to justify them in finding the existence of the conditions set forth in their declaration. We must presume that the [declarations were appropriate] unless it clearly appears that they are not in harmony with the provisions of the constitution.

134 S.W.2d at 68.

Giving "great weight" to the Legislature's findings in HB209, Appellant's claims were not resolved "without consideration." First, HB209 states expressly that the consideration lies in the uniformity and additional revenues resulting from HB209. HB209 also brings an end to costly litigation. *See, e.g., Crutcher v. Koeln*, 61 S.W.2d 750, 754 (1933) (the compromise of a doubtful claim is good consideration). Finally, HB209, by its terms, provides consideration in the form of streamlined administration and cost savings in the collection and remittance of taxes. RSMo. § 92.086.3.

Appellant asserts that HB209 lacks “any consideration at all” because HB209 only requires Sprint to waive its “unfounded” defenses. (Br. at 56.)¹⁸ Such comments must be recognized for what they are —hyperbole in the face of obvious facts to the contrary. Because Appellant’s argument is dependent on the proposition that Sprint gave up “nothing,” Appellant bears the heavy burden of proving that it can defeat every defense asserted by Sprint. TCAT’s language demonstrates that substantial defenses exist. *See supra* Section I. However, the question before this Court is whether HB209 extinguishes an “indebtedness, liability or obligation” - “without consideration.” The context provided by TCAT more than resolves the point. Viewed through the eye of the legislative findings, and the deference afforded them, and the clarity, certainty, and prospective tax payments HB209 provides, it is obvious that consideration exists.

For the first time, Appellant argues that Sprint should be estopped from arguing that TCAT does not apply to wireless service because the wireless industry lobbied for the Federal Mobile Telecommunications Sourcing Act (“MTSA”) (Br. at 56-57.) This argument was not raised below and cannot be argued here. *Christeson v. State*, 131

¹⁸ Relying on *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. 2002), Appellant claims Sprint “waived any and all defenses” to TCAT by failing to pay the tax under protest in accordance with RSMo. § 139.031. (Br. at 58-59.) Instead, *Metts* represents the entirely unremarkable proposition that when a taxpayer sues a taxing authority and seeks affirmative relief, the taxpayer must follow the statutory rules for doing so, whether the taxpayer seeks injunctive relief or is trying to obtain a tax refund *Id.* at 110.

S.W.3d 796, 800, n.7 (Mo. banc 2004) (“claims not presented to the motion court cannot be raised for the first time on appeal”). In any event, this argument oversimplifies both the MTSA and Sprint’s defenses to TCAT. The MTSA allows local governments to tax a wireless provider only for service provided to customers having a “primary place of use” within the local government’s taxing jurisdiction. The MTSA neither provides that any existing municipal business license taxes automatically apply to wireless service nor resolves the other issues inherent in TCAT. *See supra* Section I. By lobbying for the MTSA, the Wireless Companies in no way consented to retroactive application of inapplicable taxes to wireless service.

IV. HB209 does not violate the prohibition on retrospective lawmaking found in Article I, § 13 of the Missouri Constitution.¹⁹

Appellant’s argument that HB209 violates Article I, § 13 of the Missouri Constitution fails at the threshold. This constitutional prohibition on retrospective legislation does not protect municipalities because municipalities are mere instrumentalities of the State, which may waive its own rights. *Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys.*, 950 S.W.2d 854, 858 (Mo. banc 1997). Indeed, if Appellant’s position on the scope of the protections in Article I § 13 is accepted, it would render meaningless Article III, § 39(5), which specifically governs the circumstances under which the Legislature may release or extinguish debts owed to municipalities.

¹⁹ This section responds to Point 5 of Appellant’s brief.

Even if Article I, § 13 did apply to municipalities, HB209 does not impair vested rights or affect past transactions to the substantial prejudice of Appellant. *See M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 160 (Mo. banc 1997) (citing *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 447 (Mo. banc 1994)). Appellant has no vested right to back tax apyments because it depends upon the happening of an uncertain event—a final, non-appealable judgment in its favor.

A. Article I, § 13 does not apply to Appellant.

This Court has repeatedly held that the Legislature may waive the rights of an instrumentality of the state without running afoul of Article I, § 13's prohibition on retrospective laws. *See, e.g., Savannah*, 950 S.W.2d at 858; *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. 1971). This Court clearly articulated the principle in *Savannah*:

Because the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state.

Savannah, 950 S.W.2d at 858. Municipalities are instrumentalities of the State and possess only the powers the legislature grants to them. *Siegel v. City of Branson*, 952 S.W.2d 294, 296 (Mo. App. 1997); *State ex rel. Kemper*, 1881 WL 175, *3 (Mo. App. 1881). Municipalities may only levy taxes in the manner and for the purposes granted by the state. *First Nat'l Bank of St. Joseph v. Buchanan County*, 205 S.W.2d 726, 729 (Mo. 1947). The Legislature is free to waive the rights (if any) held by municipalities without violating Article I, § 13.

Savannah, this Court’s most recent decision on the subject, controls. In *Savannah*, school districts claimed the state retirement system owed them a refund of prior contributions to the teachers’ retirement fund. 950 S.W.2d at 856-57. The outcome of the suit turned on whether the term “salary rate,” as used in the retirement system rules, included certain fringe benefits. *Id.* at 857. While *Savannah* was still pending in the circuit court following remand, the Legislature redefined the term “salary rate.” *Id.* The circuit court granted the retirement system’s motion to dismiss on the grounds that the amendment mooted the legal controversy. *Id.* The school districts challenged the constitutionality of the amendment. This Court rejected the challenge, holding the retrospective law prohibition was intended to protect citizens—not the state. *Id.* at 858. Because the school districts were “creatures of the legislature,” the legislature could waive or impair their rights without violating the prohibition on retrospective laws. *Id.*

Appellant acknowledges *Savannah* controls by urging that it be overruled, with heavy citation to the dissent. (Br. at 85-87.) Both the *Savannah* dissent and Appellant’s argument fail to recognize that this Court has long-established precedent that municipalities cannot raise challenges under Article I, § 13. *See Graham*, 59 S.W.2d at 51-52 (“The state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.”) (quoting *New Orleans v. Clark*, 95 U.S. 644 (1877); *State ex rel. Kemper*, 1881 WL 175, *3 (Mo. App. 1881) (“Unlike a private corporation, no vested right in the nature of a contract exists in [municipalities], and it is competent to the Legislature to modify them at pleasure, or to take them wholly away.”)).

The *Graham* holding is based, in part, on the fact that the constitution already contains Article III, § 39(5), which governs the circumstances under which the rights of municipalities may be waived. *See* 59 S.W.2d at 51-52.

Appellant does not cite any cases expressly holding to the contrary. Appellant suggests that it is not a political subdivision because the constitution, at times, speaks of municipalities and political subdivisions in the disjunctive. (Br. at 87.) Notwithstanding Appellant's strained attempts to locate ambiguity in the Missouri Constitution, this Court has clearly concluded that municipalities are instrumentalities of the State. *See Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. banc 1962) ("A municipal corporation has been referred to as a miniature state within its locality and as an instrumentality of the state established for the convenient administration of local government."); *Arkansas-Missouri Power Corp. v. City of Kennett*, 156 S.W.2d 913, 917 (Mo. banc 1941) ("[A] municipal corporation is a mere creature of the state and not in itself sovereign."); *Donovan v. Kansas City*, 175 S.W.2d 874, 881 (Mo. banc 1943).

Article III, § 39(5) states that the Legislature shall not have the power "[t]o release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation." If Article I, § 13 is broad enough to forbid the Legislature from releasing or extinguishing the rights (if any) of municipalities, the constitution would not contain a separate provision specifically setting out the circumstances under which the Legislature may release or extinguish municipalities' rights. *See First Nat'l Bank*, 205 S.W.2d at 731 (relying on Article III,

§ 39(5) after citing *Graham* for the proposition that Article I, § 13 does not prohibit the State from waiving its own rights). More importantly, the constitution would not include the words “without consideration” in Article III, § 39(5), if Article I, § 13 already forbids the release or extinguishment of municipal rights even *with* consideration.

Appellant’s unduly broad interpretation of Article I, § 13 is an attempt to free itself from the “without consideration” language of Article III, § 39(5). As Sprint has demonstrated, *see* Section III(B), *supra*, HB209 provides sufficient consideration under Article III, § 39(5) to permit the release of Appellant’s self-proclaimed right to back taxes. This Court should not adopt an interpretation of Article I, § 13 that would render Article III, § 39(5) meaningless and effectively strip the “without consideration” language from the constitution altogether. *See Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 n.4 (Mo. banc 1996) (“Every word in a constitutional provision is assumed to have effect and meaning; their use is not meaningless surplusage.”). Instead, this Court should uphold its long-standing precedent in finding that Article I, § 13 does not apply to municipalities.

B. HB209 does not infringe upon a vested right.

Even if the State were not empowered to waive municipalities’ rights, Appellant cannot establish it has a vested right:

[A] vested right . . . must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of

property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.

Fisher v. Reorganized Sch. Dist. No. R-V of Grundy County, 567 S.W.2d 647, 649 (Mo. banc 1978) (quotations omitted). Neither persons nor entities have any vested right in their expectation that a particular law will remain unchanged. *Beatty v. State Tax Comm’n*, 912 S.W.2d 492, 497 (Mo. banc 1995). Further, a right is not vested if it depends upon the happening of an uncertain event. *M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 160 (Mo. banc 1997). For this reason, this Court has found that taxpayers do not have a vested right in the continued application of a particular tax classification. *Beatty*, 912 S.W.2d at 498. Instead, “until the tax liability is fixed as a sum certain, the definitions used to arrive at that liability are subject to change by the legislature.” *Id.* at 497.

Appellant relies on *Graham* for the proposition that an “inchoate tax” is a recognizable right under the prohibition against retrospective laws. However, as noted above, *Graham* relied on Art. III, § 39(5), not Art. I, § 13, and therefore provides no support to Appellant’s retrospective law challenge to HB209.

V. HB209 does not violate Article III, § 40’s prohibition on special laws.²⁰

Appellant offers eight different theories for why it believes HB209 violates the prohibition on special laws found in Art. III, § 40 of the Missouri Constitution.²¹ All fail

²⁰ This section responds to Point 4 of Appellant’s brief.

to survive scrutiny. First, Appellant lacks standing to raise arguments on behalf of utility companies or telecommunications companies that paid gross receipts taxes to the Municipalities. Second, the classifications created by HB209 are reasonable and include all those who are “similarly situated,” and therefore are consistent with Art. III, § 40. Indeed, as discussed in Section V. B, *infra*, Appellant has enacted ordinances that make many of the very same classifications it now challenges, and this Court has upheld similar classifications in other statutes.

A. Appellant does not have standing to challenge HB209 on behalf of others.

Many of Appellant’s “special law” challenges to HB209 are based on purported injuries to utility companies, land-line telephone companies, and wireless companies. (See Br. at 70-77.) Appellant lacks standing to raise these challenges. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). “For a party to have standing to challenge the constitutionality of a statute, he must demonstrate that he is ‘*adversely affected by the statute in question . . .*’” *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. banc 1987) (quoting *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977)) (emphasis added). This rule ensures there is a “sufficient controversy between the parties [so] that the case will be adequately presented to the court.” *Id.* Appellant lacks

²¹ Appellant argues that HB209 is a special law because it unconstitutionally changed its charter. (Br. at 77.) Sprint addresses this argument in Section VI.A, *infra*.

standing to raise special law challenges on the basis of alleged violations of the rights of others.

B. HB209 properly classifies telecommunications companies apart from gas, water, and electric companies.

HB209 does not impermissibly exclude gas, water, or electric companies. Federal, state, and local laws routinely single out telecommunications companies for differential treatment – see any of the subject ordinances and the MTSA, 4 U.S.C. §§ 116-126 (imposing special rules unique to the wireless telecommunications industry for municipal taxation). Compare TCAT’s tax rate of 10% with Appellant’s tax rate of just 4% on electric companies’ residential customers and 10% of gross receipts on non-residential customers. *See* Code § 23.30.030.A, Resp. A.42. Also compare TCAT with Appellant’s tax on certain gas companies at a rate of 4% on receipts from residential customers and 10% on receipts from non-residential customers. *See* Code § 23.36.010. A, Resp. A.45. Also, Appellant imposes a tax on yet other gas companies at a rate of 0% on residential and 10% on non-residential customers. *See* Code § 23.36.040, Resp. A.46. Differential treatment between classes of companies is permissible as long as rational basis exists for it. *Blaske v. Smith & Entzeroth*, 821 S.W.2d 822, 832 (Mo. banc 1991). *See also United Fuel Gas Co. v. Battle*, 167 S.E.2d 890, 906 (W.Va. 1969) (upholding distinction between tax rates assessed on public utility gas companies and non-utility gas companies).

Only telecommunications companies—and not gas, water, or electric companies—have been subjected to the serial litigation in which the Municipalities attempt to re-

interpret their tax ordinances. HB209 thus more than satisfies the “rational basis” requirement of Article III, § 40.

Given the disparate positions of telecommunications companies vis-à-vis gas, water, and electric companies, Appellant’s reliance on *PIEA*, 612 S.W.2d at 776-77, fails.²² (Br. at 51.) *PIEA* involved an easement granted to some utility companies whose services were provided through underground facilities, but not others. *Id.* at 777. The various types of utilities were thus “similarly situated” in the context of underground property rights. *Id.* *PIEA* does not dictate that telecommunications companies must be treated identically to water, gas, and electric companies nor would such a holding be appropriate. Indeed, it would invalidate, *inter alia*, the federal and local laws cited above that treat telecommunications companies differently than gas, water, and electric companies. *See Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. banc 1980) (“[A] law which includes less than all who are similarly situated is special, but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.”).

PIEA analyzed whether a particular law was “special” even though the issue was not necessary to the disposition of the case. 612 S.W.2d at 776-77. The precedential value of that aspect of *PIEA* is therefore limited. *See, e.g., State ex rel. Anderson v.*

²² Appellant’s brief lists several cases without identifying the particular argument to which each case applies. (*See* Br. at 76.) Sprint discusses each case as appropriate.

Houstetter, 140 S.W.2d 21, 24 (Mo. banc 1940) (“Such expressions of opinion, not in anywise necessary for the actual decision of any question before the court, are not controlling authorities in any sense, although they may at times have persuasive effect.”). Given the plethora of telecommunications-specific laws passed by federal, state, and local governments, that aspect of the opinion also lacks persuasive effect.

Other cases cited by Appellant are also inapposite. (*See* Br. at 75.) In *Ashby v. Cairo Bridge & Terminal Co.*, 100 S.W.2d 441, 444 (Mo. 1936), the Legislature deliberately put ten types of utilities into a single class for purposes of a tax reporting statute, but then exposed only four of those utilities to penalties for failing to comply with their reporting obligations. *Id.* The same is true with respect to *Taylor v. Currency Services*, 218 S.W.2d 600, 604 (Mo. banc 1949), in which the Legislature enacted a law applying to all corporations, but then withdrew certain types of corporations from one of the burdens of the law. *Id.* HB209 is far different. It defines the class as telecommunications companies *only*—i.e., it does not include gas, water, or electric companies—and therefore does not contain the inconsistency found in *Ashby* and *Taylor*.

Appellant complains that HB209 “caps” the license taxes on telecommunications companies at 5% but does not do so for other utilities. Oddly, Appellant cites to an Illinois Supreme Court case that actually supports the constitutionality of HB209. In the *Big Sky Excavating* case, which Appellant cites, small business customers of Illinois Bell (“Bell”), a land-line telephone company, challenged a statute that required the abatement of litigation against Bell seeking refunds for rates paid to Bell based on its allegedly improper classification of its services. *Big Sky Excavating, Inc. v. Illinois Bell Telephone*

Co., 840 N.E.2d 1174, 1179-80 (Ill. 2005). The statute also required Bell to refund to its customers amounts that the customers contend were less than what they would have recovered in litigation against Bell. *Id.* at 1180.

The customers challenged the statute as being unconstitutional special legislation because Bell was the only entity receiving benefits from the legislation. *Id.* at 1183. The Illinois Supreme Court rejected the special laws challenge as being “without merit,” explaining:

. . . the advantages received by [Bell] were not denied to others who were similarly situated. They could not have been, for there were no other telecommunications carriers whose situation was similar to [Bell’s] . . . [which] was the only telecommunications carrier involved in the type of [proceedings subject to abatement as a result of the statute] . . . , [which] owned much of the state’s telecommunications infrastructure and operated what was essentially a regulated monopoly of the telephone business. In this regard, [Bell] stands alone from all other telecommunications providers here.

Id. at 1183-85. Here, the telecommunications companies are in a class all their own due to the litigation.

C. HB209's treatment of telecommunications companies does not run afoul of the prohibition on special laws.

Appellant argues that HB209 violates Article III, § 40 by treating telecommunications companies that have paid gross receipts taxes differently from those

who have not. This Court rejected a similar contention in *Savannah*. There, the plaintiff school districts argued that the subject statute had an impermissibly disparate effect on those school districts that had made overpayments under the previous definition of “salary rate” for the retirement fund at issue. *Savannah*, 950 S.W.2d at 859. This Court acknowledged the amendment would result in differential treatment for certain school districts, but upheld the statute as being “rationally related to several legitimate government objectives.” One of which was the expense, complication and distraction for the adversely affected school districts to seek recovery of the overpayments. *Id.* at 860.

HB209 is far less troublesome than the statute upheld in *Savannah*. In *Savannah*, a Missouri appellate court had already interpreted the relevant statutory language, and the Legislature stepped in later to redefine it. Here, by contrast, no state court has held that TCAT applies to wireless companies, nor has any court interpreted the term “within the city” in context. Appellant relies upon the Federal Order, which itself expresses doubt on the “within the city” issue. Moreover, the federal court's expressions on state law are not binding on state courts. HB209 crafts a reasonable approach on a going-forward basis, without affecting any prior interpretation by a state court or any final judicial interpretation by a federal court.

Appellant incorrectly relies on *Laclede Power & Light Co. v. City of St. Louis*, 182 S.W.2d 70, 73 (Mo. banc 1944). (Br. at 75.) The ordinance in *Laclede* imposed a tax on some electric companies but not others. *Id.* HB209, by contrast, permits the imposition of a tax on *all* telecommunications companies. *Laclede's* reasoning does not apply to HB209.

Also, the purported class of “telephone companies that failed to pay taxes,” (*see* Br. at 70-72), is open-ended. HB209 therefore must satisfy only the “rational basis” test, which it clearly does. *See Blaske*, 821 S.W.2d at 832. The Legislature acted rationally in establishing prospective certainty on municipal taxation of all telecommunications companies. *See Savannah*, 950 S.W.2d at 860.

D. Wireless carriers differ from land-line telephone companies.

Appellant also challenges HB209 on the ground that it arbitrarily distinguishes between wireless companies and land-line telephone companies. (Br. at 72.) This challenge fails on the merits because, as Appellant itself has acknowledged, wireless carriers and land-line telephone companies differ. *See, e.g.*, Code § 23.34.050, Resp. A.02 (providing that “[e]ach such telephone company that shall accept the provisions [of TCAT] . . . shall furnish for the use of the City, such wire space as may be required . . . by the City . . . on the aerial or in the underground facilities now owned . . . by such telephone company . . .”).

Like the Municipalities, many courts have recognized that distinctions exist between land-line and wireless telecommunications services. *See supra* at 12-13. These distinctions demonstrate that the immunity granted to wireless companies under HB209 does not violate the Missouri Constitution even though identical immunity is not granted to land-line telephone companies. Instead, the Legislature had a rational basis for any distinction that may exist between these two types of companies. *See Savannah*, 950 S.W.2d at 860.

On a prospective basis, the terms “telephone company,” “exchange telephone company,” and similar phrases used in municipal ordinances will be construed to include wireless telecommunications. *See* RSMo. § 92.083(2). The Legislature added this provision to streamline municipal taxation of telecommunications companies. *See* RSMo. § 92.086 (establishing centralized administration for collection of municipal gross receipts taxes). Accordingly, no basis exists for Appellant’s position that HB209 is unconstitutional in its treatment of land-line telephone companies vis-à-vis wireless companies.

E. Telecommunications companies are not similarly situated with municipalities and do not require similar treatment.

Appellant cites no authority for its assertion that HB209 unconstitutionally “bars municipalities from pursuing class litigation against telephone companies . . . but does not foreclose telephone companies from pursuing class litigation against municipalities to recover payment of the same tax.” (Br. at 72-73.) The Court should therefore deem this argument waived. *See State v. Nicklasson*, 967 S.W.2d 596, 618 (Mo. banc 1998) (holding that appellant’s argument in brief with no citation to authority and no argument to support conclusions was waived). In any event, this is unsurprising—no authority exists for the proposition that municipalities can even be members of a class, nor does any authority exist for the proposition that municipalities and telecommunications companies must be treated in identical fashion by the legislature.

In an attempt to create support for its position, Appellant refers to *AT&T Wireless PCS, LLC, et al. v. Jeremy Craig, et al.*, case no 04-CC-000649 (Circuit Court of St.

Louis County, filed February 13, 2004), which Appellant insinuates is a class action. (See Br. at 73, n.17.) It is not, and does not purport to be. See Resp. A.49-66 (docket sheet). The citation thus shows only Appellant's desperation. Cf. *St. Louis Teachers Ass'n v. Bd. of Educ. of City of St. Louis*, 456 S.W.2d 16, 19 (Mo. 1970) ("A grave constitutional question cannot thus lightly be raised.") (internal punctuation omitted).

The Legislature may have had many grounds – such as avoiding thorny issues about when a municipality is bound by a settlement - for deciding to preclude municipalities from class actions. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."). Moreover, serious questions exist about whether municipalities would even be bound by a class-wide settlement that was not approved in accordance with the laws in each municipality. See, e.g. Springfield City Charter at § 19.26 ("All contracts, agreements and other obligations entered into, and all ordinances and resolutions passed after the adoption of this Charter and contrary to the provisions thereof shall be void.") See Resp. A.40-41. The Legislature rationally could have decided to preclude this possibility.

Municipalities and telecommunications companies are not similarly situated, and HB209's class action prohibition does not violate Article III, § 40.

F. HB209 properly classifies municipalities.

Appellant uses HB209's reference to November 4, 1980 to assert that the statute is closed-ended and therefore governed by a higher standard of scrutiny. (Br. at 66-69.)

See also RSMo. § 92.086.10 (exempting cities that, prior to November 4, 1980, had a gross receipts ordinance that specifically included the words “wireless,” “cell phones,” or “mobile phones”). Appellant’s interpretation, however, distorts the “closed-ended” concept in a way this Court could not possibly have intended when it discussed the concept of “open-ended” versus “closed-ended” classifications in the cases cited by Appellant. *See* Br. at 92-93).

HB209 uses November 4, 1980 as the basis for a distinction between municipalities because that date is constitutionally significant—*i.e.*, it is the effective date of the Hancock Amendment. Thus, HB209 is “closed-ended” only in the sense that Hancock itself is “closed-ended.” Municipalities that complied with their obligations under Hancock should not be lumped together with those that did not.

By excusing Hancock-complaint municipalities from certain HB209 provisions, the Legislature promoted the policies underlying the amendment, thereby satisfying the substantial justification requirement. *Cf. Kenefick v. City of St. Louis*, 29 S.W. 838, 841 (Mo. 1895) (“Legislation which is. . . appropriate to carry into effect a positive command of the organic law, or. . . directly contemplated by its terms, cannot justly be held to be either special or local, within the true intent and meaning of the constitution.”); *State ex rel. Garvey v. Buckner*, 272 S.W. 940, 942 (Mo. banc 1925) (same).

Notably, the closed-ended classifications in the cases cited by Appellant were based on characteristics over which the affected entities had no historical control, namely, geographic location (*Tillis, Harris*), proximity to a “city not within a county” (*O'Reilly, Riverview Gardens, Harris*), or population at a fixed point in time (*City of Blue Springs*).

The affected entities in those cases could have not done anything, past or present, to become part of the group receiving special rights (or, in the case of the City of Blue Springs, to *avoid* being part of the group burdened with special obligations). Appellant, by contrast, had every opportunity prior to HB209 to comply with Hancock by holding a public vote on expanding its tax to wireless. The fact that it chose not to should not afford it a basis for invalidating HB209. Instead, its failure to act illustrates that it is not similarly situated with municipalities that *did* comply with Hancock.²³ *See Ross v. Kansas City Gen. Hosp. & Med. Center*, 608 S.W.2d 397, 400 (“[A] law which includes less than all who are similarly situated is special, but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.”).

The Legislature balanced HB209’s potential impact on Missouri’s economy and telecommunications customers with any potential detriment to municipalities. Excluding Hancock-complaint municipalities from the legislation helped achieve this balance. *See Union Elec. v. Mexico Plastic Co.*, 973 S.W.2d 170, 174 (Mo. App. 1998) (substantial justification existed based on the “importan[ce] to balance the economic enticements offered to prospective business with sound municipal revenue”). *See also Blaske*, 821 S.W.2d at 829 (“It is not the Court’s province to question the wisdom, social desirability

²³ Appellant asserts that only Jefferson City and Clayton fall in HB209’s exception (Br. at 69), but fails to show that no other city falls within the exception. (Br. at 70.) Appellant is not similarly situated - it neither sought voter approval to expand TCAT to wireless nor did it amend TCAT prior to November 4, 1980.

or economic policy underlying a statute as these are matters for the legislature's determination.") (quotations omitted). These unique circumstances, i.e. certain municipalities taxing wireless revenues in compliance with Hancock, while others ignored Hancock's requirements, also substantially justify HB209. *See Hunter Ave. Prop., L.P. v. Union Elec.*, 895 S.W.2d 146, 154-55 (Mo. App. 1995) (approving special legislation benefiting only a single utility company based on "a unique set of circumstances which [was] unlikely to arise again in the near future.")

G. Appellant's general attack on the rationality of HB209 fails.

Appellant's final challenges to HB209 under Article III, § 40 are that its "classifications are not germane" to its purpose and it arbitrarily regulates city affairs and grants special rights, privileges or immunities to corporations "where a general law can be made applicable." (Br. at 74.) It appears to be a general attack regarding the relationship between HB209's stated purposes and its provisions. (See Br. at 73-76.) To the extent Appellant argues that a better law could have been passed to achieve the Legislature's goals, the argument is of no constitutional significance. *See State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967) ("The courts, as a general rule, cannot inquire into the motive, policy, wisdom, or expediency of legislation."). For the reasons described *supra* in Section V.B, the argument fails.

Moreover, if a statute is special on its face, it is constitutional where "some characteristic of the excluded items provides a reasonable basis for excluding it, considering the purpose of the enactment." *State v. Gilley*, 785 S.W.2d 538, 540 (Mo. banc 1990) (citation omitted). Appellant attacks all of HB209's "classifications" under

Article III, § 40(30) (Br. at 73.) Sprint has addressed each of these “classifications” above and has demonstrated a reasonable basis for each. Accordingly, HB209 complies with Article III, § 40(30).

VI. Appellant lacks standing to invoke the separation-of-powers doctrine; nevertheless, HB209 does not violate the separation-of-powers principles.²⁴

Appellant argues that because HB209 is “adjudicative” in nature, it violates separation-of-powers principles. (Br. at 92.) First, Appellant lacks standing to invoke the separation-of-powers doctrine. Second, HB209 does not violate the doctrine. Contrary to Appellant’s argument, HB209 does not direct judicial action, interpret prior law, or impact a final judgment. Rather, it addresses state tax policy well within the Legislature’s constitutional authority.

A. Appellant does not have standing to invoke the separation-of-powers doctrine because it exists to protect citizens, not government entities.

This Court has held that statutory instrumentalities of government lack standing to invoke the separation-of-powers doctrine. In *Savannah*, the legislature enacted a law effectively ending litigation brought by a school district. 950 S.W.2d at 857. *See supra* Section IV.A (discussing *Savannah*’s facts in more detail). The school district argued the statute effectively mooted a pending case, invalidly encroaching on the judicial function. *Id.* at 859. The Court made short shrift of this argument, finding that, as a “creature of

²⁴ This section responds to Points 6 and 7 of Appellant’s brief.

the legislature,” a school district lacked standing to invoke separation-of-powers. *Id.* As in *Savannah*, Appellant cannot raise a separation-of-powers challenge.

B. HB209 does not interfere with judicial decision making because it does not contravene a final judgment.

Even if Appellant had standing, HB209 does not violate Article II, § 1 of the Missouri Constitution. The purpose of the separation-of-powers clause is “to prevent the concentration of unchecked power in the hands of one branch of government.” *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993). “This language, however, does not erect an impenetrable wall of separation between the departments of government.” *Dabin v. Dir. of Revenue*, 9 S.W.3d 610, 613-14 (Mo. banc 2000).

This Court has already conclusively resolved Appellant’s argument. In *Savannah*, in response to a school district’s claim that a statute that effectively ended litigation brought by the school district violated separation-of-powers principles, the Court rejected the claim because “if a court has not yet finally adjudicated an issue in a pending case, even a retroactive amendment to the governing law does not constitute a separation of powers violation.” *Savannah*, 950 S.W.2d at 858, citing *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 226-227(1995).

Thus, the Legislature can amend the law to abrogate a pending claim at any time prior to a court’s entry of a final, non-appealable order without encroaching on the

judicial function.²⁵ With HB209, the Legislature amended the telecommunications business license taxes scheme,²⁶ but it does not alter any final, non-appealable order. Moreover, HB209 does not direct any court to dismiss the Municipalities' lawsuits but instead requires the Municipalities themselves to dismiss their lawsuits.²⁷

Plaut makes clear that governing law (including prior cases such as *Sunset Hills*) may be amended or superceded without violating separation of powers, so long as no final, non-appealable judgment has been entered in the that case at hand:

Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation

²⁵ Appellant misplaces reliance on *United States v. Klein*, 80 U.S. 128 (1871). (Br. at 89-90, 92.) *See, e.g., Plaut*, 514 U.S. at 218 (“Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law.”).

²⁶ HB209 addresses both the state enabling statutes and municipal ordinances. *See* RSMo. §§ 92.080 (amending inconsistent enabling statutes), 92.083 (construing terms in municipal ordinances to have same meanings as set forth in HB209).

²⁷ Similarly, Appellant's argument that HB209 violates the separation of powers doctrine by targeting certain litigation fails. If the Court invalidates HB209 on this basis, it will have to strike down RSMo. § 21.750.5, which targeted specific litigation, applying to any suit pending as of its effective date and any future litigation.

that the law applicable to that very case was something other than what the courts said it was.

* * *

Congress may require (insofar as separation-of-powers limitations are concerned) that new statutes be applied in cases not yet final but still pending on appeal.

514 U.S. at 227, 233 n.7 (emphasis in original). As no final, non-appealable judgment has been entered in any of the cases currently on appeal, Appellant's separation-of-powers challenge fails.

Appellant cites cases from other states that are distinguishable. Unlike the statutes at issue in *Roth v. Yackley*, 396 N.E.2d 520 (Ill. 1979), *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392 (La. 2005), and *Federal Express Corp. v. Skelton*, 578 S.W.2d 1 (Ark. 1979), HB209 was not enacted to clarify the intention of a prior legislature in enacting an already existing statute. Rather, HB209 simply amends existing law to provide for a new taxation scheme.

Additionally, several other states have addressed similar challenges and, recognizing the principles articulated in *Plaut*, upheld the constitutionality of similar laws. See *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845 (Mich. Ct. App. 2003) (law eliminating retroactive liability to municipality does not violate due process, separation of powers, or title-object clause); *Sturm, Ruger & Co., Inc. v. City of Atlanta*, 560 S.E.2d 525 (Ga. Ct. App. 2002) (application of a law eliminating retroactive liability to municipality, and extinguishing existing lawsuit, does not violate due process, equal

protection, contract, or bill of attainder clauses of either the federal or state constitutions); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (law eliminating retroactive liability to municipality does not violate separation of powers, among others). Even though enacted while this and similar cases were pending, HB209 does not violate the Missouri Constitution's separation-of-powers principle.

C. The General Assembly's declarations of public policy supporting dismissal of the lawsuits and "full and adequate consideration" do not violate separation-of-powers principles.

Appellant claims HB209 violates the separation-of-powers doctrine by requiring dismissal of pending suits and granting immunity. (Br. at 90-94.) It is within the province of the legislature to declare the public policy, *Williams v. Arkansas*, 217 U.S. 79 (1910). "[I]t is not [the judiciary's] place to judge public policy when the General Assembly [has] spoken." *Masterson v. Dep't of Soc. Servs.*, 969 S.W.2d 746, 748 (Mo. banc 1998). Deferring to the legislature's determinations of the public policy of the state raises no separation-of-powers concerns.

In any event, legislative constructions of the meaning of provisions in the Missouri Constitution, "are not binding upon the courts," *Gantt v. Brown*, 149 S.W. 644, 645-46 (Mo. 1912), although they are clearly entitled to "great weight." *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65, 68 (Mo. banc 1939). Section 92.089.1 does not violate separation-of-powers principles.

D. HB209 does not impermissibly encroach upon the executive branch, as the Missouri Constitution expressly grants the General Assembly the

power to collect taxes, and the General Assembly may to delegate that power.

Appellant erroneously asserts that, pursuant to its charter, the power of enforcing TCAT belongs to it, and therefore HB209 encroaches on its executive function by “mandating dismissal” of these lawsuits and by “forbidding audits and new enforcement actions.” (Br. at 96.) In essence, Appellant argues its charter trumps the provisions of HB209 that provide for the dismissal of these lawsuits.

A municipality’s authority to tax derives from the legislature, and it can thus be limited by the legislature. The Missouri Constitution expressly states the “taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.” MO. CONST. art. X, § 1. *See also Henry v. Manzella*, 201 S.W.2d 457, 459 (Mo. banc 1947) (“Article X, § 1 of the Missouri Constitution broadly confides the whole taxing power to the Legislature.”). “Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from the lawmaking power.” *State ex rel. Emerson v. City of Mound City*, 73 S.W.2d 1017, 1025 (Mo. banc 1934). Thus, this Court has recognized that “as municipal corporations have no inherent power of taxation, consequently they possess only such power in respect thereto which has been granted to them by the Constitution or the statutes” *Id.*

The Municipalities (or their collectors of revenue) are authorized, of course, to sue to collect taxes that are actually due and owing. But even if the Municipalities had established that the Wireless Companies were liable for precise gross receipts taxes—which they have not—the right of the Municipalities, including Appellant, to pursue an action for the collection of certain gross receipts taxes is always subject to limitations imposed by the Missouri legislature.²⁸

The fact that Appellant is governed by charter does not compel a different result. “A county or a city, charter or otherwise is *imperium in imperio*, that is, a government within a government...A charter does not transform a county or city into a government apart from and superior to the state.” *St. Louis County v. Univ. City*, 491 S.W.2d 497, 499 (Mo. banc 1973). *See also Kansas City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 203 (Mo. banc 1935) (finding that taxing authority granted by charter is subordinate to the constitution and subject to change or revocation by the legislature).

The Legislature can pass taxation laws regardless of the provisions of a municipal charter. *See, e.g., Coleman v. Kansas City*, 182 S.W.2d 74, 77-78 (Mo. banc 1944) (rejecting city’s argument that state statute did not apply to it because its charter provided a complete system of taxation); *J.I. Case*, 87 S.W.2d at 202. Appellant cites no authority for the proposition that its charter should be treated differently.

²⁸ Accordingly, HB209 permissibly limits this right with its “subjective good faith” provision. (*See, e.g., Br.* at 94.)

Finally, Appellant recognizes the legislature may “control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or, by the power of appropriation.” *Mo. Coal. for the Env’t v. Joint Comm’n on Admin. Rules*, 948 S.W.2d 125 (Mo. banc 1997). (Br. at 96.) Appellant argues, however, that HB209 does not amend enabling statutes and TCAT because the text of HB209 does not expressly use the term “amend.” (Br. at 91, n.25.) HB209’s text refutes this argument:

Notwithstanding any provisions of this chapter or chapter 66, 80, or 94, RSMo., or the provisions of any municipal charter, after August 28, 2005, no municipality may impose any business license tax, tower tax, or antennae tax on a telecommunications company except as specified in sections 92.074 to 92.098.

In sum, HB209 does not encroach on any executive function and Appellant’s separation-of-powers challenge fails.

VII. HB209 does not require showing of subjective good faith for dismissal and does not permit re-filing of this case on or after July 1, 2006.

A. HB209’s dismissal requirements are mandatory and not conditioned on subjective good faith.²⁹

Ending litigation by a political subdivision of the state is a permissible desire of the Legislature and a permissible requirement of legislation.³⁰ *See Savannah*, 950

²⁹ This section responds to Point 7 of Appellant’s brief.

S.W.2d at 860. But dismissal conditioned on litigating subjective good faith surely would prolong and perpetuate the “costly litigation” and would be antithetical to the General Assembly’s desire to promote the “economic well being of the state” by requiring the immediate dismissal of this litigation. RSMo. § 92.089. Although subjective good faith is mentioned in HB209, HB209 clearly requires the *immediate* dismissal of the underlying litigation, and it does not condition that dismissal on subjective good faith. While Sprint has no doubt that its subjective good faith would be demonstrated, HB209 simply does not require such a showing in this case.³¹

Instead, HB209 unequivocally states: “If any municipality, prior to July 1, 2006, has brought litigation or caused an audit of back taxes for the nonpayment by a telecommunications company of municipal business license taxes, it shall immediately dismiss such lawsuit without prejudice . . .” RSMo. § 92.089.2 (emphasis added). Thus, HB209 sets forth four requirements for immediate dismissal, none of which is a showing of subjective good faith: if 1) a municipality, 2) brought litigation before July 1, 2006, 3)

³⁰ The standard of review for this argument is that applied to a typical dismissal. *Farm Bur. Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995); *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000).

³¹ The trial court found that the pleadings and objective factors establish Sprint’s subjective good faith belief. (L.F. at 154-155.) While Sprint agrees with this conclusion, it is unnecessary to the questions at hand, as HB209 requires immediate dismissal without further showing.

against a telecommunications company, 4) seeking to recover for nonpayment of municipal license taxes, the municipality “shall immediately dismiss such lawsuit . . .” RSMo. § 92.089.2.

The Court must give effect to every word of the statute, and Appellant’s suggestion that Sprint may have had to prove subjective good faith prior to dismissal reads the word “immediately” right out of HB209. (Appellant’s Br. 35 n.3). *See Hannibal Trust Co. v. Elzea*, 286 S.W. 371, 377 (Mo. 1926) (“Another cardinal rule in the construction of statutes is that effect must be given, if possible, to every word, clause, and sentence.”)

Such a strained interpretation would also read the legislature’s finding that “resolution of such uncertain litigation” formed part of the consideration for HB209’s new tax scheme out of the statute. RSMo. § 92.089.1. The “resolution” that the legislature intended to take place could not occur if the dismissal of the litigation were conditioned on a showing of subjective good faith, which could itself be uncertain, or if Appellant could later bring yet another lawsuit against Sprint seeking back taxes allegedly due for periods before July 1, 2006.

Because HB209 does not condition dismissal of existing litigation on a finding of subjective good faith, the trial court did not err in dismissing Appellant’s lawsuit.

B. Both the statutory text and legislative intent demonstrate that HB209 ends this litigation.

The primary rule of statutory construction is “to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider

the words in their plain and ordinary meaning.” *Murray v. Highway and Transp. Com’n.*, 37 S.W.3d 228, 233 (Mo. banc 2001). Statutory construction “should avoid unreasonable or absurd results.” *Id.* Applying these principles, the Court must reject absurd readings of HB209.

The text of HB209 demonstrates the legislature’s intent to *end*, not to postpone or perpetuate, the “costly litigation which have or may be filed against telecommunications companies ... [that is] detrimental to the economic well being of the state.” RSMo. § 92.089.1. The statutory text provides remarkable clarity on the legislature’s intent – “the **resolution** of such uncertain litigation ...” forms part of the consideration for the “immunity and **dismissal** of lawsuits... .” *Id.* (emphasis added). Appellant agrees with this construction of the statute. (Appellant’s Br. 96, 98.)

It is no accident that immunity ends on July 1, 2006 and the new tax scheme of HB209 takes effect on the very same day. HB209 thus establishes: 1) an end to costly, economically detrimental litigation, existing at the time of enactment or filed any time before July 1, 2006, seeking back taxes; 2) a defense to new litigation filed against new parties *after* July 1, 2006 seeking back taxes allegedly accruing *before* July 1, 2006 under ordinances of theretofore dubious applicability;³² and 3) the ability of municipalities to impose, collect, and sue for taxes accruing *after* July 1, 2006, as HB209 itself resolved the prospective applicability of the cities’ decades-old ordinances to wireless.

³² Appellant agrees that § 92.089.2 establishes a “new defense” in such litigation. (Appellant’s Br. 103, 108.)

VIII. HB209 provides clear standards for dismissal and immunity and is not void for vagueness.³³

In a footnote, Appellant contends HB209 is void for vagueness, challenging the inclusion of the term “subjective.”³⁴ (Br. at 35, n.3.) Appellant, however, neither cites authority for its conclusory assertion that HB209 is “void for vagueness” nor raises it as a point on which it relied. Thus, the Court should deem this argument to be waived. *See Nicklasson*, 967 S.W.2d at 618 (holding that appellant’s argument in brief with no citation to authority and no argument to support broad conclusions was waived).

IX. HB209 does not violate Article X, section 3 or Article I, section 2 of the Missouri Constitution or the Fourteenth Amendment to the United States Constitution, and Appellant lacks standing.³⁵

A. Appellant lacks standing to assert uniformity or equal protection.

Appellant asserts that application of HB209 leads to an unconstitutional lack of uniformity forbidden by Article X, § 3 of the Missouri Constitution and unlawful classification in violation of equal protection under Article I, § 2 of the Missouri

³³ This section responds to footnote 3 at page 35 of Appellant’s brief.

³⁴ Appellant’s argument collapses under its own weight. It claims it is “unclear from the terms of HB209 whether such a ‘good faith belief’ is required for lawsuit immunity, lawsuit dismissal, or both.” (Br. at 35, n.3.) This argument reads the word “immediately” out of the statute. *See supra* Section VII.

³⁵ This section responds to Points 11 and 12 of Appellant’s brief.

Constitution and the Fourteenth Amendment to the United States Constitution. Specifically, Appellant contends HB209 sets arbitrary classifications by granting immunity to those who have not paid the questionable license taxes but granting no immunity to those who have paid the taxes and by treating telephone companies differently than providers of gas, water, or electric. (Br. at 112, 116.)

As a threshold matter, Appellant lacks standing to raise these constitutional protections. A party must demonstrate that he is “adversely affected by the statute in question” to have standing to challenge that statute. *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. banc 1987) (quoting *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977)) (emphasis added). In other words, a litigant must have a “personal stake” in resolution of the issue raised. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 53 (Mo. banc 1989). Appellant asserts distinctions to support its uniformity and equal protection challenges that do not adversely affect it. Payment of past taxes by certain companies does not vest a municipality with a right to complain about the treatment of those companies.

Moreover, Article I, § 2 of the Missouri Constitution applies only to “persons.” Appellant is not a “person” entitled to protection under the equal protection clause, and it therefore lacks standing to challenge HB209 on equal protection grounds. *See City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991); *State ex rel. Mehlville Fire Protection Dist. v. State Tax Comm’n*, 695 S.W.2d 518, 521 (Mo. App. 1985) (political subdivision is not a “person” within the due process clause).

B. HB209 presents no uniformity or equal protection issues.

Article X, § 3 of the Missouri Constitution provides that “[t]axes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.” Article I, § 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution guarantee persons equal protections under the law. Appellant argues that HB209 violates these provisions, resting its argument on two comparisons: (i) those companies that in the past paid gross receipts taxes without challenge to those that did not pay based upon a subjective good faith belief that the ordinances were inapplicable to their services; and (ii) “telephone companies” as opposed to providers of gas, water, or electric. (Br. at 112, 116.) These arguments fail as detailed below.

1. HB209 applies uniformly to all similarly-situated class members.

Two important principles guide courts considering whether a tax is “uniform upon the same class or subclass of subjects.” MO. CONST. art. X, §3. First, a tax is presumed uniform. *Vill. of Beverly Hills v. Schuler*, 130 S.W.2d 532, 535 (Mo. 1939). Second, the constitution does not require absolute uniformity, but only that the same category of subjects, classified by the legislature, be taxed uniformly. *State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 636 (Mo. banc 1942) ; *see Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74, 77 (Mo. banc 1983) (permissible to treat one class of entities differently from another).

Treating those that voluntarily pay a tax differently from those that either do not pay the tax or pay the tax “under protest” is consistent with Missouri law. For example,

except in certain circumstances, a taxpayer who elects to pay a tax without following the protest procedures outlined in RSMo. § 139.031 generally waives any right to recovery if the tax is later found inapplicable. *Buck v. Leggett*, 813 S.W.2d 872, 878 (Mo. banc 1991). Although arguably unfair to the taxpayer, this fundamental precept prevents burdening taxing jurisdictions with the potential hardship of having to refund taxes they have received in reliance on the validity of their taxing statutes or ordinances. *See Lane v. Lensmeyer*, 158 S.W.3d 218, 222-223, n.7 (Mo. banc 2005).

Appellant's uniformity argument ignores that those that paid did so voluntarily, which removes the payors from any uniformity analysis. In *Mid-America Television Co. v. State Tax Commission*, 652 S.W.2d 674 (Mo. banc 1983), affiliated corporations that could not file a consolidated state tax return asserted a uniformity challenge to Missouri income tax statutes that arguably allowed a larger federal income tax deduction for affiliated corporations that could file a consolidated state tax return. This Court noted that the complaining companies chose to be part of their class of companies and, as a result, could not be heard to complain of the consequences of that choice.

Further, telecommunications companies and providers of gas, water, and electric are not a "natural class." Each provides different types of services, to different customers, and requires different services from the municipality. Appellant's own taxing schemes prove this point. *See* Section V(B), *supra*. But even if there were such a "natural class," uniformity requirements do not prohibit tax sub-classifications, only those that are arbitrary, unreasonable, or without substantial justification. *Bert v. Dir. of*

Revenue, 935 S.W.2d 319, 321 (Mo. banc 1996). *See* section V.B, *supra*. Such differing treatment is constitutional.

2. HB209 does not violate the Equal Protection clauses of the Missouri or United States Constitutions because any differing treatment has a rational basis.

Assuming, *arguendo*, that HB209 results in a classification of taxpayers, it does not violate equal protection clauses. When considering equal protection challenges to tax classifications, the Court applies a rational basis standard. *Brookside Estates v. Tax Comm’n of MO*, 849 S.W.2d 29, 31 (Mo. banc 1993); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). A classification that bears a rational relationship to a legitimate legislative objective is constitutional. A classification will be sustained if *any* state of fact reasonably can be conceived to justify it. *Id.* at 313-4. A legislative choice “is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004) (citing *FCC*, 508 U.S. at 315). “[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . .” *FCC*, 508 U.S. at 313-4.

The Municipalities allege that HB209 denies equal protection by: (1) exempting select businesses from taxation; (2) arbitrarily classifying for taxation purposes; and (3) discriminating against companies that paid taxes. (Br. at 116.) HB209 applies the same tax rate and base to every telecommunications company within each taxing municipality and establishes certainty in the only industry engaged in rampant license tax litigation. This certainty eliminates variations in tax payments.

Furthermore, the classification is rationally related to the Missouri tax protest procedure. Taxpayers not complying with RSMo. § 139.031 were on notice that their unprotested tax payments were unrecoverable. Ironically, the very parties raising this challenge are the taxing entities that Missouri protest laws protect at the expense of taxpayers. *Lane*, 158 S.W.3d at 723, n.7; *Metal Form Corp. v. Leachman*, 599 S.W.2d 922, 925 (Mo. banc 1980). Because Missouri law supports this rational classification, the cases from other states Appellant cites do not apply.³⁶

In summary, HB209 violates neither the Uniformity Clause of the Missouri Constitution nor the Equal Protection Clauses of the Missouri and United States Constitutions.

X. HB209 complies with both the single-subject and clear-title rules set forth in Article III, § 23 of the Missouri Constitution.³⁷

HB209 is titled “AN ACT to amend Chapters 71, 92, and 227, RSMo., by adding thereto eighteen new sections relating to the assessment and collection of various taxes on telecommunications companies, with an effective date for certain sections.” HB209 contains provisions referred to as the “Municipal Telecommunications Business License Tax Simplification Act” (“MTTA”) and provisions referred to as the “State Highway

³⁶ Appellant’s citation to *City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577 (Mo. App. 1988), is misplaced because the classification there lacked any rational basis.

³⁷ This section responds to Points 8 and 13 of Appellant’s brief.

Utility Relocation Act” (“SHURA”). HB209 does not violate the single-subject and clear-title rules.

A. SHURA fairly relates to the subject described in HB209’s title.

Article III, § 23 provides that no bill shall contain “more than one subject which shall be clearly expressed in its title.” The single-subject rule “keep[s] individual members of the legislature and the public fairly apprised of the subject matter of pending laws and [] insulate[s] the governor from ‘take-it-or-leave-it’ choices when contemplating the use of the veto power.” *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 326 (Mo. banc 2000) (further citation omitted). Missouri courts attempt “to avoid an interpretation of the Constitution that will ‘limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law.’” *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994) (further citation omitted). Contesting statutes under the single-subject rule is disfavored, and the constitutionality of those statutes is strongly presumed. *C.C. Dillon*, 12 S.W.3d at 327, *City of St. Charles v. State* 165 S.W.3d 149, 150 (Mo. banc 2005). This Court interprets the single-subject rule “liberally” and upholds statutes unless they “*clearly and undoubtedly*” violate the constitutional limitation. *See C.C. Dillon*, 12 S.W.3d at 327 (quoting *Hammerschmidt*, 877 S.W.2d at 102).

The test under the single-subject rule is whether the challenged provision “fairly relates to the subject described in the title of the bill”; “has a natural connection to the subject”; or “is a means to accomplish the law’s purpose.” *City of St. Charles*, 165 S.W.3d at 151 (quoting *Fust v. Attorney Gen.*, 947 S.W.2d 424, 428 (Mo. banc 1997)).

The test focuses on the relationship between the challenged provision and the subject of the bill as expressed in its title. *See id.*; *C.C. Dillon*, 12 S.W.3d at 328.

To determine the subject of a bill, the Court first looks to its title as finally passed. *See C.C. Dillon*, 12 S.W.3d at 329. The subject also includes “all matters that fall within or reasonably relate to the general core purpose of the proposed legislation.” *City of St. Charles*, 165 S.W.3d at 151-52. For example, in *City of St. Charles*, St. Charles filed suit to challenge the constitutionality of S.B. 1107, which was entitled “An Act To repeal [certain sections], and to enact in lieu thereof forty-three new sections relating to emergency services, with penalty provisions.” *Id.* at 151. The bill also included provisions prohibiting utilization of tax increment financing (“TIF”) in charter counties of a certain population in areas designated as a flood plain by federal authorities. *See id.* St. Charles argued the bill violated the single-subject rule because the TIF provisions did not relate to “emergency services.” *Id.*

But this Court disagreed, holding the TIF provisions were “sufficiently related to the subject of the bill—emergency services—to pass constitutional muster.” *Id.* Noting that while “in the abstract there seems to be no connection” between emergency services and TIF, the “obvious and significant goal of the TIF amendments is to ensure that adequate emergency services are available in certain areas that need them most—‘area[s] designated as flood plain.’” *Id.* As a result, the TIF provisions “fairly relate” to emergency services (the subject of S.B. 1107). *Id.*

Similarly, in *C.C. Dillon*, a company challenged S.B. 883, which allowed cities and counties to regulate billboards more strictly than provided for in state billboard

regulations. *See* 12 S.W.3d at 324-25. As finally passed, S.B. 883 was titled “An Act to repeal [certain sections] relating to transportation, and to enact in lieu thereof two new sections relating to the same subject.” *Id.* at 325. The company challenged the billboard provisions of S.B. 883 under the single-subject rule. *See id.* at 329. Again, this Court upheld the statute, pointing out the “very function of billboards is to capture the attention of the traveling public,” and billboards have been “inextricably linked to highway transportation by federal and state legislation,” and holding billboards “fairly relate to, or are naturally connected with, transportation.” *Id.* at 327.

As expressed in HB209’s title, its subject concerns “the assessment and collection of various taxes on telecommunications companies....” The subject of HB209 includes all matters that “fall within” or “reasonably relate to” the assessment and collection of these taxes. *See City of St. Charles*, 165 S.W.3d at 151. Under the applicable test, this Court must consider whether the SHURA fairly relates to, has a natural connection to, or is an incident or means to accomplish the assessment and collection of various taxes on telecommunication companies. *Id.*

SHURA fairly relates to and has a natural connection with the subject of HB209. It requires telecommunications companies that own “utility facilities” (as defined by RSMo. § 227.242(21)) within the rights-of-way along state highways to relocate such facilities at their own expense, while MTTA simplifies the taxation on the revenues telecommunications companies may derive from those facilities. Thus, HB209 reallocates benefits and obligations with respect to the cost of doing business in Missouri

municipalities. The inclusion of SHURA in HB209 in no way constitutes a clear and undoubted violation of the single-subject rule.

Like in *C.C. Dillon*, federal law inextricably links taxation on telecommunications companies to the use of rights-of-way. *See, e.g.*, 47 U.S.C. § 253(c) (permitting state and local governments to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers for use of public rights-of-way). Indeed, Appellant ties taxation to right-of-way use. City Code § 23.32.030 (“No telephone corporation shall be privileged to use the streets, alleys and public places of the City. . . except upon [payment of the TCAT tax]”) Resp. A.67. Congruous with the connection between taxation of telephone companies and those companies’ use of the rights-of-way in the Municipalities, SHURA allows certain municipalities to enact ordinances regarding the use of municipal highways, streets, and roads. *See* RSMo. § 227.249.

The linkage between taxes and the use of rights-of-way under federal law and in Appellant’s own ordinance shows a “fair relation” or “natural connection.” *See C.C. Dillon*, 12 S.W.3d at 327-330. HB209 complies with the single-subject rule.

B. HB209’s title clearly indicates that it amends Chapter 227.

The clear-title rule simply requires the title to indicate in a general way the kind of legislation being enacted. *C.C. Dillon*, 12 S.W.3d at 329. Under this rule, if the title of a bill contains a particular limitation or restriction, any provision that exceeds the limitation in the title is invalid because the title “affirmatively misleads the reader.” *Id.* The bill’s title cannot be underinclusive but need only indicate its general contents. *Id.*

Appellant contends HB209's title is underinclusive and affirmatively misleading because it gives "a reader the mistaken impression that HB209 pertains exclusively to taxes on telecommunications companies without alerting the reader to Chapter 227's provisions" (Br. at 99-100.) To the contrary, a member of the legislature or the general public reading HB209's title immediately learns it is "[a]n act to amend chapter[. . . 227," which is entitled "State Highway System" and which deals extensively with utilities' rights-of-way under and along state highways. *See, e.g.*, RSMo. § 227.130, *et seq.* HB209's title notifies a reader that the bill affects Chapter 227 and conforms with the clear-title rule.

C. Even if the Court were to determine HB209 violated Article III, § 23, SHURA is severable from MTTA.

Even if the Court were to find that HB209 contains multiple subjects, MTTA survives because it was the bill's original, controlling purpose as clearly expressed in the title. A violation of the single-subject rule will not invalidate a bill if the Court is "convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not." *Hammerschmidt*, 877 S.W.2d at 103.

In making this determination, the Court considers whether the challenged provision is essential to the bill's efficacy, is one without which the bill would be incomplete and unworkable; and is one without which the legislators would not have adopted the bill. *See id.* If the Court determines a bill "contains a single central [remaining] purpose," then it will sever the portion of the bill containing the additional

subject, and the bill will stand with its “primary, core subject intact.” *Id.* “In determining the original, controlling purpose of the bill for purposes of determining severance issues, a title that ‘clearly’ expresses the bill’s single subject is exceedingly important.” *Id.* The Court also looks at the text of the bill and its progression through the General Assembly. *See id.*, 877 S.W.2d at 103-04.

In *Hammerschmidt*, this Court concluded that certain county-constitution provisions were “not essential to the efficacy of the bill,” the election provisions were “both complete and workable” without the county-constitution provisions, and “the legislature would have adopted the bill without [the county-constitution provisions].” *Id.* at 104. Accordingly, the Court held the county-constitution provisions were severable and allowed the election provisions of the bill to remain in effect. *Id.* *See also SSM Cardinal Glennon Children’s Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. banc 2002); *Nat’l Solid Waste Mgmt. Ass’n v. Dir. of Dep’t. of Natural Res.*, 964 S.W.2d 818, 822 (Mo. banc 1998); *Carmack v. Dir., Mo. Dep’t. of Agric.*, 945 S.W.2d 956, 961 (Mo. banc 1997).

In this case, SHURA is severable from MTTA. From its inception, HB209 was concerned with municipal business license taxes on telecommunications companies. The original, controlling purpose of HB209, as expressed in its title, was to amend sections relating to the assessment and collection of various taxes on telecommunications companies. Chapters 71 and 92, as amended by HB209, contain the central purpose of the legislation, and both chapters are complete and workable without SHURA. Finally, a

review of HB209's history demonstrates the legislature would have passed HB209 without the inclusion of SHURA.³⁸ Accordingly, SHURA is severable from MTTA.

Similarly, even if the Court were to find a clear-title violation, it would not be fatal to § 71.675 or §§ 92.074-92.098 (MTTA). Rather, only SHURA would be unconstitutional. *See Nat'l Solid Waste Mgmt. Ass'n*, 964 S.W.2d at 822 (holding that where clear-title rule has been violated, the bill is unconstitutional only to the extent that it refers to a subject not clearly expressed in the title). Therefore, the provisions set forth in the MTTA survive attack on HB209 under the single-subject and clear-title rules.

³⁸ On or about March 7, 2005, before the bill included SHURA, the House Ways and Means Committee voted "do pass" a version that did not include SHURA. On April 20, 2005, before the bill included SHURA, it passed by a vote of 97 to 55 in the House. On May 2, the Senate Committee on Economic Development, Tourism and Local Government passed a substitute that did not include SHURA, making a "do pass" recommendation to the entire Senate. On May 10, the Senate passed the bill as amended to include SHURA, with a vote of 23 to 8. On May 12, 2005, the House passed the amended bill, with a final vote of 105 to 52. *See Activity History for HB209*, Resp. A.70-71.

XI. Appellant lacks standing to challenge HB209 under the Hancock Amendment.³⁹

Appellant contends that HB209 violates Hancock. (Br. at 100.) But Appellant lacks standing to make this argument. Hancock protects taxpayers not tax collectors. By its clear language, Art. X, Section 23 limits the class of persons who can bring suit to enforce Hancock to “any taxpayer.” *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995); *accord State ex rel. Bd. of Health Ctr. Trustees v. County Comm’n*, 896 S.W.2d 627, 631 (Mo. banc 1995). A municipality is not a “taxpayer” within the meaning of Section 23. *See City of Hazelwood v. Peterson*, 48 S.W.3d 36, 40 (Mo. banc 2001).

These authorities deny Appellant’s claim of standing. (Br. at 106.) Because Appellant essentially seeks a declaration that HB209 violates Hancock, its situation cannot be distinguished from that of the school district in *Fort Zumwalt* seeking a declaration that the state funding scheme violated Hancock. *See* 896 S.W.2d at 920.

Despite these decisions, Appellant insists that it has standing to challenge HB209 under Hancock, and, entirely inconsistent with its proclamation that it does so under § 24 of Hancock, Appellant challenges HB209 under sections 16 and 22.

This Court’s *Hazelwood* decision, holding that Hazelwood, notwithstanding its status as a fee payer, had no standing to maintain a Hancock challenge, abrogates *State ex rel. City of St. Louis v. Litz*, 653 S.W.2d 703 (Mo. App. 1983) – the case principally

³⁹ This section responds to Points 9 and 10 of Appellant’s brief.

relied upon by Appellant, which actually deflates Appellant's claim to standing. (Br. at 107.) In *Litz*, the appellate court determined that the city could challenge the constitutionality of a City of Berkeley ordinance under which the city *was a fee payer* and that the city, "as a past, present and future fee payer, has a real interest in the outcome of an action challenging the validity of the fee, and thus, has met the requisite of standing." *Litz*, 653 S.W.2d 703, 706. Unlike *Litz*, Appellant has no interest as a fee payer to confer standing.

Appellant relies on cases that do not involve municipal challenges to statutes and/or do not involve challenges under Hancock. See *City of St. Louis v. Cernicek*, 145 S.W.3d 37 (Mo. App. 2004) (finding that, by failing to bring issues before the trial court, city waived constitutional challenges to RSMo. § 21.750(4-6); *W.R. Grace and Co. v. Hughlett*, 729 S.W.2d 203 (Mo. 1987) (private company challenged constitutionality of property tax assessments on grounds other than Hancock); *Arsenal Credit Union v. Giles*, 715 S.W.2d 918 (Mo. banc 1986) (city officials had standing to challenge constitutionality of property tax exemptions on grounds other than Hancock). Appellant also points to dicta from *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981), in which the Court noted that "[p]rovision is made in section 23 of the amendment to give taxpayers and political subdivisions standing to enforce the amendment in the courts." The *Buchanan* Court did not address whether a municipality has standing, under any circumstances, to raise a Hancock challenge, but since *Buchanan*, this Court has made it clear that only taxpayers – or fee payers – are afforded standing under Hancock.

A. HB209 does not violate Article X § 22(a) of Hancock.⁴⁰

Without citing to any case law in support of its position – because none exists – Appellant advances the argument that HB209’s dismissal provision violates § 22(a), which Appellant argues “prohibits the suspension of the power to tax unless specifically permitted in the Constitution.” (Br. at 103.) No language in § 22 remotely suggests such a proposition.⁴¹ Moreover, § 22 only applies when a political subdivision takes action – it does not apply to the Legislature’s actions. *See St. Charles County v. Dir. of Revenue*, 961 S.W.2d 44, 49 (Mo. banc 1998) (holding that the Director’s decision to redistribute the revenue derived from a local use tax does not violate § 22 because Hancock only applies to the actions of a political subdivision and not those of the state). Accordingly, Appellant’s Hancock challenge fails.

⁴⁰ This section responds to Point IX of Appellant’s brief.

⁴¹ By its plain language, § 22 operates as a proscription on municipalities’ taxing authority by prohibiting municipalities from increasing an existing tax or imposing a new tax without voter approval. Section 22 does not give any municipality a vested or affirmative right in any tax revenues.

B. HB209 does not violate Article X, §§ 16 and 21 because there has never been a state mandate in existence with respect to business license taxes and any administrative burdens imposed by HB209 are borne by the State, rather than the Municipalities.⁴²

Appellant bears the burden of establishing that HB209 violates Hancock. *Browning-Ferris Indus. of Kansas City, Inc. v. Dance*, 671 S.W.2d 801, 811 (Mo. App. 1984). This Court has held that “proof of new or increased duties and increased expenses . . . cannot be established by mere ‘common sense,’ or ‘speculation and conjecture.’” *Brooks v. State*, 128 S.W.3d 844, 849 (Mo. banc 2004) (citing *Miller v. Dir. of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986)). Appellant provides no evidence of a new activity or of any increased expenses it will sustain as a result of HB209.⁴³ Its claim that HB209 violates § 16 of Hancock fails.

Appellant argues HB209 violates § 16 of Hancock because it shifts “the cost of the State’s policy of rescuing telephone companies” onto municipal governments by forgiving past disputed tax liability. (Br. at 108.) Section 16 does not prohibit shifting a cost of state policy – it prohibits shifting the state’s tax burden. MO. CONST. art X, § 16.

⁴² This section responds to Point 10 of Appellant’s brief.

⁴³ Even if Appellant could somehow establish that HB209 constitutes a state mandate, its claim that HB209 violates the “unfunded mandate” provisions of Hancock nevertheless fails because any administrative burdens imposed by HB209 fall on the state – not municipalities.

Appellant confuses an elimination or compromise of a disputed claim with an “unfunded mandate.” HB209 does not violate Sections 16 and 21 as (i) there has never been a state mandate in existence with respect to business license taxes, and (ii) the state alone bears any burdens imposed by HB209.

Appellant bases its argument solely on § 16 of Hancock, but such an argument takes § 16, which must be read with § 21, out of context. *See Brooks v. State*, 128 S.W.3d 844, 848 (Mo. banc 2004) (Article X, §§ 16 and 21, the “state mandate” provisions are to the same effect). Read together, Sections 16 and 21 require that: (1) “[t]o the extent that the state required local governments to perform activities and provided some funding of those activities on November 4, 1980, the state is prohibited from reducing the state financed proportion of the costs of the mandated activity;” and (2) the state is prohibited from “requiring local governments to begin a new mandated activity or to increase the level of a previously mandated activity beyond its 1980-81 level unless the General Assembly appropriates sufficient funds to finance the cost of the new or increased activity.” *Fort Zumwalt Sch. Dist.*, 896 S.W.2d at 921.

The State has permitted – *but not mandated* – municipalities to impose business license taxes on gross revenues for services provided by certain entities. *See, e.g.*, RSMo. § 71.610 (provisions on the taxing authority of charter cities); RSMo. § 94.360 (granting the council of special charter cities the power to levy and collect business license taxes). HB209 does not reduce funding for any mandated municipal activity in existence as of the date of Hancock because no such mandated activity ever existed. HB209 does not require Appellant to engage in any new or increased activity, as compared to the level of

activity in existence as of November 4, 1980, without state financing. *See St. Charles County*, 961 S.W.2d at 48 (holding that statute allowing DOR to withhold use tax disbursements from municipalities did not impose a “new or increased activity or service” without state funding because it “applies only to the [DOR], and does not require the Local Taxing Authorities to take any action and clearly does not require them to undertake any new or increased activity or service.”)

CONCLUSION

For the foregoing reasons, Sprint respectfully requests that this Court affirm the judgment entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by (____) U.S. Mail, postage prepaid; (____) fax; (____) Federal Express; and/or (____) hand delivery this ____ day of _____, 2006, to:

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RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word and contains _____ words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is New Times Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the Clerk.
